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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ISAAC BLACKFORD, A. M.,
ONE OF THE JUDGES OF THE COURT.

SECOND EDITION; WITH ANNOTATIONS,
BY EDWIN A. DAVIS.

VOL. VI.

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OF THE

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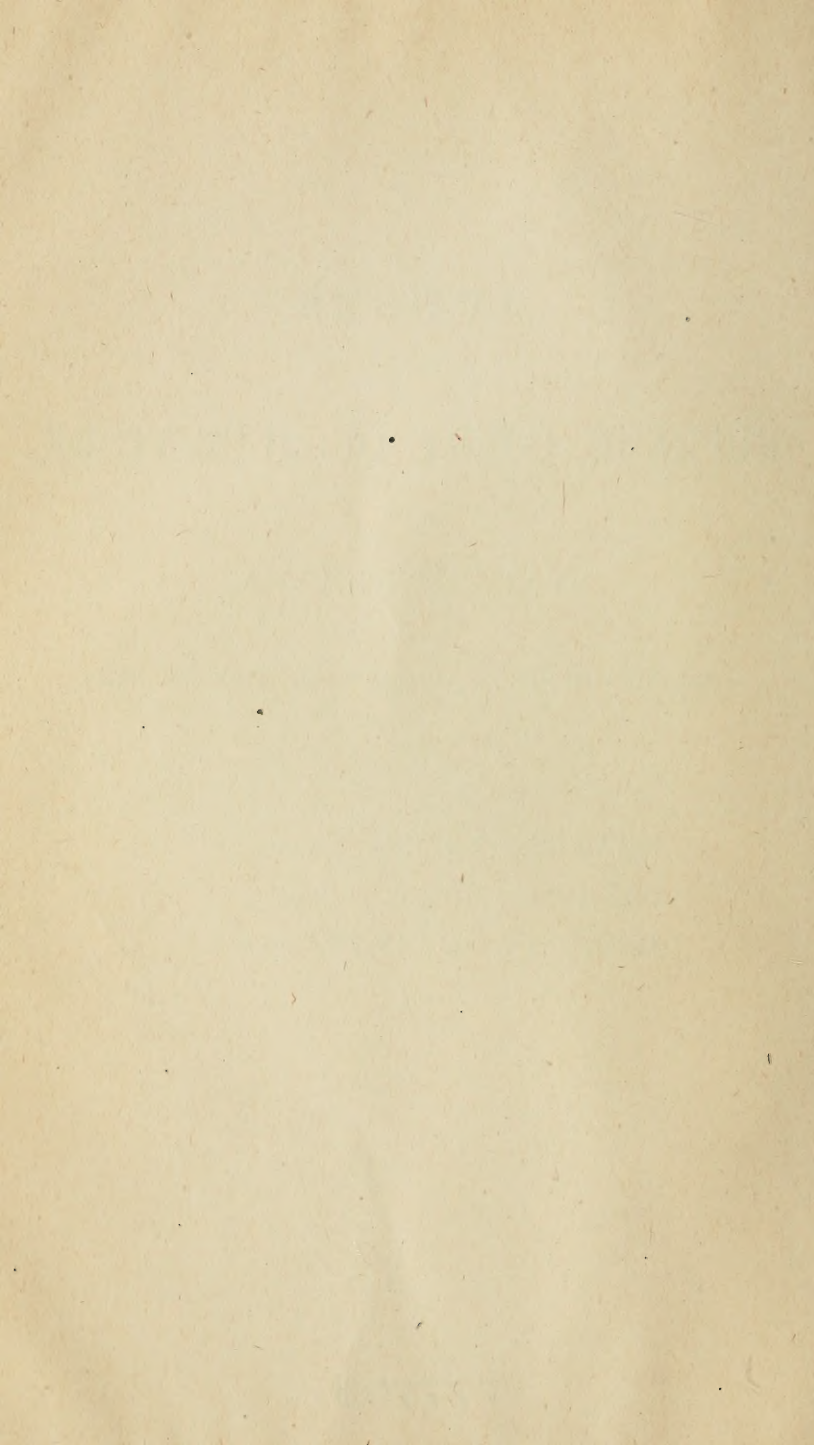
STATE OF INDIANA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

ISAAC BLACKFORD. Esquire.

CHARLES DEWEY, Esquire.

JEREMIAH SULLIVAN, Esquire.



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[*I]

*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1841, IN THE TWENTY-SIXTH YEAR OF THE STATE.

WALKER v. THE STATE, on the Relation of SARAH CORBIN.

APPEAL BY STATE—BASTARDY.—The State may appeal to the Circuit Court from the judgment of a justice of the peace in favor of the defendant in case of bastardy; and no appeal-bond is required in such case. (a)

SAME—PRACTICE.—The Circuit Court, on such appeal, may order a writ to issue to compel the defendant's appearance.

BASTARDY—EVIDENCE.—The complainant in such case (the child being unborn), having been examined on the trial as a witness for the State, may be asked on cross-examination, whether she had had sexual intercourse with any other person than the defendant about the time when she said the child was begotten; but not whether she had had such intercourse at any other time. (b)

SAME.—The statute authorizes the general moral character of a witness to be inquired into; but the inquiry should be, not what it was at any former period, but what it was at the time of the trial.

SAME.—A witness for the defendant in a case of bastardy having stated, on

Note.—Judge Dewey was absent during the first week of this term, in consequence of the indisposition of his family.

(a) *Wolf v. The State*, 11 Ind., 231; 3 Id., 564.

(b) *Hill v. The State*, 4 Ind., 113; 13 Id., 357; 27 Id., 384.

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cross-examination, that the defendant had always denied being the father of the child, was asked by the defendant to relate all he had heard him say about the matter. *Held*, that the question was improper.

SAME.—The credit of a witness can not be impeached by proof of particular facts.

[*2] **SAME.**—*In a case of bastardy, which is a civil suit, the defendant can not introduce evidence of his general good character. (a)

PRACTICE.—If the complainant's examination before the justice in such case, which was reduced to writing, be not introduced as evidence on the trial in the Circuit Court, neither party can refer to it in argument.

EVIDENCE.—If there be a preponderance of evidence in such case against the defendant, he may be found guilty.

APPEAL from the *Fayette* Circuit Court.

BLACKFORD, J.—This is a case of bastardy. The suit was instituted by the State, on the relation of *Sarah Corbin*, against *Joseph Walker* before a justice of the peace. The defendant pleaded not guilty. The justice tried the cause and rendered judgment for the defendant. The State appealed to the Circuit Court. The defendant moved the Court to dismiss the appeal, but the motion was overruled. A writ was then issued in a cause, by order of the Court, to compel the defendant's appearance, and he was arrested accordingly. The parties appeared and submitted the cause to a jury. Verdict and judgment against the defendant.

The defendant contends that the appeal should have been dismissed, because no appeal lies in such case when the judgment of the justice is for the defendant. It is true, the statute as to illegitimate children does not give an appeal in a case like this; but it does not prohibit an appeal. We consider the appeal to be authorized by the statute concerning justices of the peace. The language of that statute on the subject is, "In all cases not otherwise specially provided for by this act, or some other statute of this State, it shall be lawful for any party to any judgment of any justice to appeal therefrom at any time," &c. Rev. Stat., 1838, p. 383. Another ground taken to show that the appeal should have been dismissed is, that there was no appeal-bond. But this is a case in which

(a) *Byers v. The State*, 20 Ind., 47; 25 Id., 68.

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no bond is required. Neither the State nor the relator would be liable for costs though the suit failed.

It is contended that the issuing of the writ, and the defendant's consequent arrest, were unauthorized. We think otherwise. But supposing the defendant's position right, he should have moved for his discharge from custody. That was all he could have done. The appeal was rightly taken, and the defendant was bound to take [*3] notice of it. The writ and arrest to compel his appearance, if not warranted by the statute, can be no cause for reversing the judgment.

Upon the trial in the Circuit Court, the complainant was examined as a witness for the State. The defendant on cross-examination asked her (the child being unborn) if she had ever had sexual intercourse, *at any time*, with any other person than the defendant? This question was objected to, and the objection correctly sustained. The question was irrelevant.

The witness having stated that she had never had sexual intercourse with other any person than the defendant before the child was begotten, the defendant asked her how long it was after the time when she said the child was begotten, before she had had such intercourse with some other person than the defendant? This question was objected to and was correctly decided to be improper. The inquiry was too general. It should have been confined to about the time the child was said to have been begotten.

The defendant asked the witness if she had not had sexual intercourse with some other person than the defendant, *within three months* after the time she said the child was begotten? This question was irrelevant, and being objected to, was rightly excluded.

The testimony on the part of the State being closed, the defendant called a witness and asked him, what was the general character of the complainant as to prostitution or virtue, previously to and at the time the child was said to have been begotten? This question was objected to and the

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objection correctly sustained. It is true the general moral character of a witness may be inquired into; Rev. Stat., 1838, p. 275; but the inquiry should be, not what it was at any former period, but what it was at the time of the trial.

The defendant asked a witness what she had heard the complainant say, if anything, about the complainant's having had sexual intercourse with any other person than the defendant, at any other time than about the time the child was said to have been begotten. This question was irrelevant, and being objected to, was rightly overruled.

One of the defendant's witnesses was asked by the plaintiff, on cross-examination, what he had heard the [4] defendant say about begetting this child? The answer was, that he had always bitterly denied it. On the re-examination, the defendant asked the witness to relate all he had heard the defendant say about this matter. This question of the defendant was objected to and correctly overruled. The answer to the plaintiff's question showing the defendant's positive denial of the charge, there was no ground for the defendant's inquiry.

The defendant asked one of his witnesses to state the particular circumstances of a charge of falsehood, which charge the witness had stated on cross-examination, he had heard made a year before against the complainant. This question was objected to and rightly overruled. The credit of a witness can not be impeached by proof of particular facts.

The defendant offered witnesses to prove his own general character to be good. The counsel for the State admitted the defendant's character to be good; but, at the same time, objected to the evidence, and the objection was correctly sustained. This is not a prosecution for a crime, but a civil suit; and the defendant's character was not in issue. The evidence, therefore was inadmissible. 1 Phil. Ev., 176; *Attorney General v. Bowman*, 2 Bos. & Pull., 532; *Fowler v. The Aetna Fire Ins. Co.*, 6 Cowen, 673.

The defendant, in his argument to the jury, proposed to point out certain variances alleged to exist between the com-

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plainant's testimony before the justice and that before the jury, her evidence before the justice having been reduced to writing and certified by the justice to the Circuit Court. But the plaintiff objected to this course on the ground that the complainant's examination before the justice had not been introduced as evidence to the jury; and the objection was sustained. The Court did right. Either party might, under the statute, have read to the jury as evidence the complainant's examination before the justice; but as it had not been given in evidence, neither party could refer to it in argument.

The defendant asked the Court to instruct the jury, that if they had "rational doubts of the defendant's being the father of the child, they must acquit." This instruction was refused; but the Court instructed the jury, "that if the evidence should preponderate against the defendant, the *preponderance would authorize them in finding him guilty." Had this been a criminal case, the instruction asked for should have been given, and that given would have been wrong; but as it is a civil suit, there is no error in this part of the cause. *Hiler v. The State*, 4 Blackf., 552.

Per Curiam.—The judgment is affirmed with costs.

S. W. Parker, for the appellant.

C. B. Smith, J. S. Newman, and *G. Holland* for the appellee.

DILLON and Others v. THE STATE BANK OF INDIANA.

PROMISSORY NOTE—JOINDER OF PARTIES.—The assignee of a promissory note negotiable and payable at a branch of the State Bank, may, by virtue of the statute, join the maker and indorsers of the note in one suit; but he can not so join the maker and part of the indorsers, unless those not joined are dead.

SAME.—Although the declaration in such case show that the maker and part only of the indorsers are sued, it should not, on that account, be demurred to, but the non-joinder should be pleaded in abatement, unless the declaration show that the party omitted is alive.(a)

(a) See *Bradley v. Ward*, post 190.

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PRACTICE.—If a declaration contain one good count, a demurrer to the whole declaration should be overruled.

ERROR to the *Cass* Circuit Court.

SULLIVAN, J.—The State Bank of *Indiana* brought an action of debt against *Dillon* the maker, and others the indorsers, of a promissory note negotiable and payable at the branch bank of *Fort Wayne*. The declaration describes a note made by *Dillon* and payable to *William Polke*, by *Polke* indorsed and delivered to *H. Lasselle, jun.*, by *H. Lasselle, jun.*, to *H. Lasselle, sen.*, by *H. Lasselle, sen.*, to *George Smith*, and by *Smith* to the plaintiff. The suit was founded on the 11th section of the act “relative to practice in the Circuit Courts,” approved *February* the 18th, 1839, (Acts of 1839, p. 36), and was commenced against all the parties to said note except *Polke*, who was not joined in the writ.

The declaration contains two counts. The first is special setting forth the note and the indorsements; the second is upon an account stated. *Smith* filed a general demurrer to *the whole declaration; the other defendants demurred to the first count and pleaded *nil debent* to the second. The court overruled the demurrers. The issue on the second count was, by the consent of the parties, tried by the Court. Judgment for the plaintiff.

The section of the statute on which suit was brought, is as follows:

“It shall be lawful for the holder of any note negotiable by the law-merchant, to institute one suit against all the parties to such note who may be liable at common law to the holder; but no such holder shall be permitted at any term of any Circuit Court to institute more than one suit upon any such note.”

The first question that arises in the case is, whether the suit should not have been brought by the holder against all the parties to the note who were living at the time of suit brought; or whether the plaintiff was at liberty to proceed against the maker and part of the indorsers, leaving part unsued.

The statute gives to the holder of such a note as that described in the declaration, a new remedy. By the law-merchant he is permitted to bring separate and simultaneous suits against the maker and indorser, but he can not join them in the same suit. By the statute he possesses a more enlarged remedy, and being statutory it must be pursued. The statute makes it lawful, under certain circumstances, to join different causes of action which before could not be joined, and different parties who, before its passage, could not be united in the same suit, and directs the number that shall be sued, that is, all the parties to the note that are liable to the holder by the common law. Instead of regarding the maker and indorsers of a note as separately liable to the holder, the statute authorizes him to proceed against them as jointly liable, and against whom payment may be enforced by one judgment and one execution. The common law remedy of the holder is not taken away by the statute, but as before remarked a new remedy is given him, which, if he adopts it, must be pursued according to the terms of the statute. The holder of the note in the present case, having elected to proceed under the statute, has erred in omitting to join *Polke* in the writ.

[*7] *The next question is, whether the omission is fatal on demurrer. This case may be assimilated to a suit on a joint contract, in which one of the joint contractors is omitted in the writ. The principle is settled, that if a joint debtor be omitted who ought to have been made a defendant, the omission can only be taken advantage of by plea in abatement, unless the declaration shows that the party omitted is living. If the declaration shows that fact, the defendant is excused from showing it by plea. *Bovill v. Wood*, 2 M. & S., 23; *Hawkins v. Ramsbottom*, 6 Taunt., 179; *Rees v. Abbott*, Cowp., 832; *Cabell v. Vaughan*, 1 Saund. Rep., 291 and notes; *Rice v. Shute*, 5 Burr., 2611. (1) The declaration in this case shows that *Polke* was a party to the note, but it does not show that he was living at the time suit was brought. He may have been dead;

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if so, the plaintiff was excused from making him a defendant. If the fact were otherwise, the defendants should have pleaded it in abatement of the writ. The demurrer, therefore, was correctly overruled.(2)

The court did right, also, in overruling the separate demurrer of *Smith*, for the additional reason that there is one count in the declaration which is unexceptionable. *Farnham v. Hay*, 3 Blackf., 167.

The Court heard the testimony and decided the issue of fact. No exceptions were taken, nor is any reason shown why the judgment of the Court on that issue should be disturbed.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

W. Wright, for the plaintiffs.

C. Fletcher, *O. Butler*, and *S. Yandes*, for the defendant.

(1) Accord. *Bragg v. Wetzel*, Vol. 5 of these Rep., 95; *Wilson v. The State*, May term, 1842.

(2) If one of two joint contractors die, the survivor may be sued without making any mention of the deceased party; and the plaintiff may recover, in the same action, a demand for which the defendant was individually liable, and one for which he was liable jointly with his deceased partner, *Richards v. Heather*, 1 Barn & Ald., 29. And in declaring on a bill of exchange accepted by the defendants and another person since deceased, it is no variance that the deceased person's name is not mentioned. *Mountstephen v. Brooke*, *Ib.*, 224.

But it has been held, in an action of assumpsit brought by a surviving joint contractor, that the fact of his being survivor should be stated [*8] in the declaration; and that, therefore, a count for goods sold by the plaintiff to the defendant, is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglas*, 4 Barn. & Ald., 374. Vide note 4 to *Cabell v. Vaughan*, 1 W. Saund., 291, g, h.

DOE v. DANIELS and Others, Executors.

APPEAL-BOND—PLEADING.—Suit on an appeal-bond against the executors of one of the sureties. The appeal had been taken by a defendant from a judgment against him in ejectment; and the bond was conditioned for the prosecution of the appeal with effect, and the payment

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of the condemnation money and costs should the judgment be against the appellant. Breach, that the appellant did not prosecute the appeal with effect, and that the judgment was affirmed. *Held*, that the plaintiff could not, in this suit, recover the *mesne profits*. *Held*, also, that the breach assigned was sufficient.

APPEAL from the *Allen* Circuit Court.

SULLIVAN, J.—The plaintiff brought an action of debt against the defendants as the executors of the last will and testament of *James Daniels*, deceased, on a bond entered into by the testator and others for the due prosecution of an appeal from a judgment of the *Allen* Circuit Court to this Court. The condition of the bond as shown on *oyer*, after reciting that one *Samuel Harris* had appealed to the Supreme Court from a judgment of the *Allen* Circuit Court rendered against him in an action of ejectment, was as follows: "Should the said *Harris* well and truly prosecute his said appeal with effect, and pay and satisfy the condemnation money and costs that are now and that may be adjudged against him in said cause in case judgment be rendered against him on said appeal, then this obligation to be void," &c. The breach assigned is, that *Harris* did not prosecute his suit with effect, but on the contrary, the judgment of the Circuit Court was affirmed by the Supreme Court.

The plaintiff avers in his declaration that the judgment of the Circuit Court in the action of ejectment was for the unexpired term of the plaintiff, but he does not show what amount of damages, if any, was recovered by him. He further avers that the yearly rents of the premises, the possession of which he recovered, were of the value of
 [*9] *\$200; that by said appeal he was prevented from taking possession thereof, and was kept out of possession for the period of two years, &c.

General demurrer to the declaration and judgment for the defendants.

It is not necessary to decide at present whether a bond given to a fictitious person can be enforced by suit. That question does not arise in this case. There is no plea

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questioning the reality of the plaintiff, and the Court can not know whether he be a real or fictitious person.

The avowed object of this suit is to recover from the defendants, who are the executors of one of the sureties in the bond, the *mesne profits* of the land from the date of the judgment in the Circuit Court in *April*, 1826, until *May*, 1828, at which time the judgment of this Court was entered upon the records of the Circuit Court. And it is submitted to this Court to decide, whether the plaintiff can recover the *mesne profits* upon an obligation to pay the condemnation money and costs that should be adjudged against the appellant on failure to prosecute his appeal with effect.

By "the condemnation money" is meant the damages that should be awarded against the appellant, by the judgment of the Court. It does not embrace damages not included in the judgment. The damages actually sustained by a plaintiff in ejectment by the detention of the property, are usually recovered in an action of trespass for *mesne profits*, when, by the judgment of the Court, the plaintiff becomes entitled to the possession.

The plaintiff in this Court, to support the claim set up by him, refers to the practice in *England*, by which, if a writ of error be brought on a judgment in ejectment after verdict, and the judgment be affirmed, the plaintiff in error and his sureties are liable for *mesne profits*. That remedy, however, is given by statutes 16 and 17, Car. 2, chap. 8. By those statutes, the plaintiff in error is required to enter into recognizance with sufficient sureties, to pay to the plaintiff in ejectment such costs and damages as may be awarded to him on judgment being affirmed; and in case of affirmance, the Court is authorized to award a writ to inquire as well of *mesne profits*, as of waste committed after the first judgment. Those statutes are not in force in

[*10] this State; and if *they were, they would not avail the plaintiff in the present case, because the defendants would not be chargeable with the *mesne profits* unless their amount had been ascertained by a writ of in-

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quity, and included in the judgment of the Court *Doe v. Reynolds*, 1 M. & S., 247. The defendants, therefore, are not liable in the present action for the *mesne profits* of the land.

Notwithstanding the plaintiff can not recover all he sues for, his declaration shows a good cause of action. The breach, that the appellant (*Harris*) did not prosecute his appeal with effect, is well assigned. To prosecute with effect means, as this Court has repeatedly decided, to prosecute to a successful termination.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the demurrer set aside, with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

E. H. Colerick and *T. Johnson*, for the defendants.

GLOVER and Another v. JENNINGS, Assignee.

NOTE PAYABLE IN BANK—DEFENSES.—Debt by the assignee of the payee against the maker of a promissory note negotiable and payable at a branch of the State Bank. The note was assigned before it became due. Pleas, 1, That the note was executed without consideration; 2, That the payee obtained the note of the defendant by fraud; 3, That the consideration of the note had failed. *Held*, on general demurrer, that the pleas were insufficient.(a)

APPEAL from the *Orange Circuit Court*.

BLACKFORD, J.—This was an action of debt on a promissory note brought by *Jennings*, assignee of the payee against the makers. The note is for \$350, dated the 28th of *May*, 1839, and payable twelve months after date. It was made negotiable and payable at the branch at *New Albany* of the State Bank of *Indiana*, and was assigned before it became due, viz., on the 14th of *June*, 1839.

There are eleven special pleas in bar. One is, that the

(a) *Hankins v. Shoup*, 2 Ind., 342.

note was executed without any consideration. Four [*11] of *them are, that the note was obtained by the payee from the defendants by fraud, covin, and misrepresentation; one of which pleas of fraud is in general terms, and the others set out the circumstances respecting the consideration relied on as fraudulent. The residue of the pleas are, that the consideration for which the note was executed has failed; one of which pleas of failure of consideration is in general terms, and the others set the consideration and the manner of its alleged failure.

General demurrers to the pleas; demurrers sustained; and final judgment for the plaintiff.

If the note, in this case, had not been made negotiable and payable at a chartered bank within the State, the most of the pleas would have been good. They are a bar when the suit is by the payee against the maker; and, when the note is not payable at a chartered bank within the State, they are also a bar to a suit by the assignee against the maker. Rev. Stat., 1838, p. 118. So, if the note now sued on had been assigned *after it became due*, the most of the pleas in question would have been good. *Boehm et al. v. Sterling et al.*, 7 T. R., 419.

But as this case stands, the pleas are all bad. Notes, like the one before us, negotiable and payable at a chartered bank within the State, are placed by statute on the same footing with inland bills of exchange. Rev. Stat., 1838, p. 119. They are therefore governed by the law-merchant. By that law, none of the pleas in question can be sustained. Take, for example, the plea, that the note was obtained from the makers by fraud, covin, and misrepresentation. That would be good, were the suit brought by the payee; but it is insufficient where, as in this case, an indorsee is the plaintiff. *Bramah v. Roberts*, 1 Bingh., N. C., 469. The plea should have gone further, and shown that the indorsee was *in privity with the payee*, and the suit thus subject to the same equities attached on the note, to which the payee's suit would have been liable. That could only

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appear, by showing that the indorsement was made without consideration, or with notice of the fraud, or after the note became due. *Burrough v. Moss*, 10 B. & Cress., 558; *Bramah v. Roberts*, *supra*.

Again, take the plea, that the note was executed without consideration. That should have also stated [*12] that the *indorsement was made without consideration, or after the note became due. *Lewis v. Parker*, 4 Ad. & Ell., 838. According to the plea as it now stands, in the language of *Tindal*, C. J., the indorsee might be suing on the fairest case. No suspicion is thrown on the transaction, and indorsement *prima facie* imports consideration. *Low v. Chifney*, 1 Bingh., N. C., 267.

We have had occasion before to examine the questions involved in this cause, and our conclusion was then the same that it is now. *Yeatman v. Cullen et al.*, November term, 1839. This opinion also accords with the case of *McClintick v. Johnston et al.*, 1 McLean's Rep., 414.

Per Curiam.—The judgment is affirmed with 6 per cent. damages and costs.

H. P. Thornton and *J. W. Payne*, for the appellants.

G. G. Dunn, for the appellee.

SMITH v. BAINBRIDGE.

WITNESS.—In a suit against a guarantor for the price of goods sold to another upon the defendant's letter of credit, the person to whom the goods were sold is a competent witness for the plaintiff.

LETTER OF CREDIT.—If a letter of credit state, that the writer will guaranty the payment of goods to be afterwards sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral. In such cases, the person to whom the goods are sold is liable on a general count for goods sold and delivered; but the writer of the letter can only be sued on the special contract.

SAME.—To sustain a suit on such collateral promise, the plaintiff must prove that he had, within a reasonable time after the debt became due, demanded payment of the principal debtor, and given notice of his non-payment to the defendant. But even if such proof were not generally

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necessary to charge the guarantor, still he would not be liable without it, if the principal debtor was solvent when the debt fell due and afterwards became insolvent. (a)

ERROR to the *Boone* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Bainbridge* against *Smith*. The declaration, which [13] was *filed in *February*, 1841, contains two counts.

The first is special, and is to the following effect :

That, on, &c., at, &c., in consideration that the plaintiff, at the defendant's request, would sell and deliver to *Barb* and *Campbell* certain goods, the defendant, by a certain letter dated in *November*, 1837, promised the plaintiff that he would be entirely safe in any sales he might make to said *Barb* and *Campbell* to any reasonable amount, as they wished to increase their stock on a short credit, and also promised the plaintiff that he, the defendant, would be security for the said *Barb* and *Campbell*, on account of such sales, until they should secure the confidence of the plaintiff by their own punctuality, or until the plaintiff should be otherwise directed by the defendant; that the plaintiff confiding in the said promise, &c., did, before said *Barb* and *Campbell* had secured his confidence, and before he was otherwise directed by the defendant, sell and deliver to said *Barb* and *Campbell*, on a certain credit, certain goods to increase their stock, &c., amounting to \$300; that though the credit had elapsed, yet said *Barb* and *Campbell* had not, though often requested, paid, &c.; of all which the defendant, on, &c., had notice: Yet the defendant has not paid, &c.

The second count is a general one for goods sold and delivered.

Plea, the general issue.

The Cause was submitted to the Court. On the trial, Mr. *Barb*, of the said firm of *Barb* and *Campbell*, was offered by the plaintiff as a witness. The defendant objected to

(a) *Virden v. Ellsworth*, 15 Ind., 144.

the witness as incompetent, but the objection was overruled. The evidence in the cause was as follows :

Shortly after the date of the letter of credit described in the declaration, and which was read in evidence, *Barb* and *Campbell* delivered it to the plaintiff, who furnished them, on the credit of the letter, with goods to the amount of about \$200, on ninety days' credit. One of the firm, on bringing the goods home, informed the defendant of the plaintiff's having furnished the goods. The greater part of that bill of goods was, some time afterwards, paid by *Barb* and *Campbell*; and the plaintiff then furnished them with other goods, amounting to about \$200, on the same terms. After the credit expired, which was in the [*14] spring of 1838, the *plaintiff sent his clerk to *Barb* and *Campbell* to demand payment. On the demand being made, they paid a part and gave their due bill for the balance, viz., \$133, dated the 12th of *July*, 1839. They offered then to confess judgment for that balance, and replevy the judgment, which offer the clerk refused. At that time *Barb* and *Campbell* would have secured the debt; but they have since become insolvent. No part of said balance had been paid.

The Circuit Court, on this evidence, gave judgment in favour of the plaintiff for \$147 in damages.

The first question in the cause is as to the admissibility of the witness who was objected to as incompetent. The objection, which was founded on the supposed interest of the witness was correctly overruled. If the plaintiff, who called the witness, succeeded, he could not, it is true, afterwards sue the witness for the same demand. But the defendant, having been obliged to pay the debt as the witness' guarantor, could sue the witness for the amount thus paid for him together with the costs of suit. The determination of the cause, therefore, in the plaintiff's favour, instead of benefiting the witness would be an injury to him.

The next question relates to the nature of the contract on which the suit is founded. The plaintiff in error considers

his contract to be collateral, viz., that he was to pay for the goods only in case of the default of *Barb* and *Campbell*. On the contrary, the defendant in error contends that the promise, contained in the letter of credit, to pay for the goods was unconditional; and that he has a right to recover on the general count for goods sold and delivered.

We think the legal construction of the contract proved in this case is as the plaintiff in error understands it. Letters of credit, to be sure, frequently state, in express terms, that if the third party do not pay, the writer will. But the insertion or omission of such statement is not the test by which to determine the character of the contract. If the writer state that he will guaranty the payment of goods to be afterwards sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral. The purchaser, under these circumstances, for whose use the goods are furnished,

is himself liable in the first instance, and it is only [*15] after his default that the surety *becomes liable.

Chitt. on Contr., 397, *et seq.* Here, *Barb* and *Campbell* bought and received the goods for their own use, and the plaintiff looked to them in the first instance, as he was bound to do, for payment. They were answerable, as the principal debtors, on a general count for goods sold and delivered; but the defendant, as their guarantor or surety, is only liable in a suit founded on the special contract. *Mines v. Sculthorpe*, 2 Camp., 215.

Another question in the cause is, whether the evidence supports the special count?

It appears that in *July*, 1839, the plaintiff demanded payment of *Barb* and *Campbell* of the amount then due on the sales with which the guarantee was connected. They paid a part and gave a due bill, as it is called, for the balance. But no notice of this demand and non-payment, or of the amount due, was ever given to the defendant. In *February*, 1841, which was eighteen months after the debt was due and demanded, this suit was commenced. The

defendant objects to the suit on the ground of his not having had notice of his principal's default and of the amount due; and in support of the objection, he relies on a decision of the Supreme Court of the *United States*. The contract in that case was similar to the one before us. It was a promise by the defendant to answer for the default of another, and was a continuing guarantee. The Court below had refused to instruct the jury, that it was necessary for the plaintiff to prove that he had demanded payment of the principal debtor, and had given the defendant notice, within a reasonable time, of the non-payment. The Supreme Court determined that the instruction ought to have been given. The following is the language of the Court: "By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a *casus fœderis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may [*16] choose, but have a right to *insist that the risk of their responsibility shall be fixed, and terminated within a reasonable time after the debt has become due." *Douglass v. Reynolds*, 7 Peters, 113, 127. That case fully sustains the defendant's objection to the sufficiency of the plaintiff's evidence.

There is another point as respects the evidence which it may be proper to notice. There is proof, that when the demand of payment was made on *Barb* and *Campbell*, they were able and willing to secure the debt, but that they afterwards became insolvent. It is decided that if a person, not the payee, indorse a note before its delivery with the words "I guaranty the payment of the within note," the promise is collateral, the guarantor not being liable in the first in-

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stance. It is also decided in that case, that the mere laches of the payee, who was the plaintiff, in not demanding payment of the maker, and giving notice to the defendant, who was the guarantor, of the non-payment, would not of itself discharge the defendant; yet that as the maker was solvent when the note fell due and became insolvent afterwards, the plaintiff ought not to recover against the guarantor. *Oxford Bank v. Haynes*, 8 Pick., 423. Were we to recognize that decision as correct, and consider it applicable to the present case, it would not benefit the plaintiff. The suit must still fail in consequence of the damage which, were the plaintiff to recover, would be sustained by the defendant from his want of notice of *Barb* and *Campbell's* default, who were solvent when the demand on them for the debt was made, but who afterwards became insolvent. 3 Kent's Comm., 123.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

P. Sweetser, for the plaintiff.

R. A. Lockwood, for the defendant.

[*17] *MUNSON v. CHEESBOROUGH and Another.

ACCOMMODATION NOTE—DEFENSES.—Debt by an assignee against the maker of a promissory note negotiable and payable at a bank in *Cincinnati*. The note was indorsed before it became due; and a statute of *Ohio*, similar to the law-merchant, governed the case. Plea, that when the note was executed, the defendant was not indebted to the payee; that it was given as an accommodation note to be discounted at bank; that if the note should be discounted and the money paid to the payee or the defendant, it was to remain in force, otherwise to be void; that the note was not discounted; and that the indorsement was made with notice to the plaintiff of the above-named facts, and without consideration. *Held*, that the plea was good.

ERROR to the *Jefferson* Circuit Court. The declaration in this suit states, that the note and indorsements described in it were executed at *Cincinnati* in the State of *Ohio*; that the indorsements were made before the note became due; and that the note was payable at the Commercial Bank in

Cincinnati. It also sets out the statute of *Ohio* which governed the case, and which is similar to the law-merchant.

SULLIVAN, J.—Debt by *Cheesborough* and *Weaver*, indorsees, against *Munson*, on a promissory note negotiable and payable at the Commercial Bank in *Cincinnati*. The note was made by *Munson* payable to *I. F. Lowry*, by *Lowry* indorsed to *G. L. Murdock*, and by *Murdock* to the plaintiffs. The defendant pleaded three pleas. On the first and third there was a trial, and verdict for the plaintiffs.

The second plea avers in substance, that at the time of the execution of the note, *Munson* was in no wise indebted to *Lowry*, the payee of the note; that it was given by *Munson* to *Lowry* as an accommodation note to be discounted at bank; that if the note should be discounted and the money paid to *Lowry* or to the defendant, the note should remain in full force, but if not discounted it should be void; that the note was not discounted; that at the times of the indorsement of said note by *Lowry* to *Murdock*, and by *Murdock* to the plaintiffs, they had notice respectively of the foregoing facts; that said indorsements were mere voluntary indorsements, and made without any consideration whatever, &c.

[*18] *The plaintiffs demurred to the second plea; the demurrer was sustained by the Court; and final judgment was given for the plaintiffs.

If this suit were by *Lowry*, the payee of the note, against *Munson*, it is clear from the facts disclosed in the plea, that the latter could not be made liable. The note, it is true, imports a consideration; but as between the original parties to it, it may be shown that none existed. An attempt by *Lowry* to collect the amount from *Munson* would have been a fraud upon the latter.

Where a third person becomes the holder of a bill or note negotiable by the law-merchant, which had been obtained from the maker without consideration, if it can be proved that he had notice of the transaction between the original parties, and gave no value for the note or bill, he will be

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affected by everything which would affect the first holder. *Collins v. Martin*, 1 Bos. & Pull., 651.

The plea shows not only that the plaintiffs had notice of the transaction between the original parties, but that they gave no value for the note. If it would have been a fraud on the part of *Lowry* to attempt to enforce the collection of the note, it is equally so on the part of the plaintiffs under the circumstances disclosed by the plea. The demurrer therefore should have been overruled. *Denniston v. Bacon*, 10 Johns. R., 198; *Rumsey v. Leek*, 5 Wend., 20; *Rees v. Headfort*, 2 Campb., 574; *F. & M. Bank v. Ross*, 1 Blackf., 315. (1)

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Stevens, for the plaintiff.

J. G. Marshall and *C. Cushing* for the defendants.

(1) Vide *Yeatman v. Cullen et al.*, November term, 1839; *Glover et al. v. Jennings*, ante, p. 10.

[*19] *CRUIKSHANK and Another v. HENRY.

BAILMENT.—Assumpsit for goods sold, &c. Pleas, non assumpsit, &c. The facts were as follows: The plaintiff being the owner of two thousand gunny bags, instructed a warehouseman in whose possession they were, to deliver them to the defendant if he called for them, but if they were not so called for, to sell them. The defendant called and received the bags—paying the warehouseman his charges, &c. At the time of this transaction, there was a contract between the plaintiff and defendant for a quantity of corn to be delivered by the latter to the former in bags; which corn was not delivered. *Held*, that these facts did not sustain the suit.

ERROR to the *Knox* Circuit Court.

SULLIVAN, J.—Assumpsit by *Henry* against the plaintiffs in error. The declaration contains two counts; 1, *Indebitatus assumpsit* for goods sold and delivered; 2, Account stated. The defendants pleaded non-assumpsit and payment.

The facts were, that the plaintiff was the owner of two thousand gunny bags, which were in the possession of a warehouseman at *Vincennes*; that the owner instructed the

warehouseman to deliver the bags to *Cruikshank & Co.*, if they called for them, if they did not, to sell them; that *Cruikshank & Co.* called for the bags and they were delivered to them, they paying to the warehouseman his charges, &c. There was proof that at the time the bags were delivered to *Cruikshank & Co.*, there was a contract between the plaintiff and the defendants in the Court below, for a quantity of corn to be delivered by defendants to plaintiff in bags; and that the corn was not delivered.

The cause was tried by the Court, and judgment given for the plaintiff.

The testimony does not prove a contract of sale, nor any thing from which the law will imply one. The bags were transferred from the possession of the warehouseman to the possession of the defendants below, but for what purpose does not appear. They became the bailees of the property, and can not be made liable for its value, unless it be shown that they have converted it to their own use.

In the case of *Cooper v. Helsabeck*, 5 Blackf., 14, where the defendant had converted to his own use a wagon left in his possession by the plaintiff, this Court decided [*20] that the *plaintiff might waive the tort, and recover the value of the wagon in an action of assumpsit. The principle of that decision is, that the defendant, in such circumstances, will not be permitted to take advantage of his own wrong, and the law will therefore imply a contract to pay.

In the case before the Court, it does not appear that there has been a conversion of the property. The bags may yet be in the possession of the defendants below, ready to be delivered to the plaintiff on demand.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. Judah, for the plaintiffs.

C. Fletcher, *O. Butler*, and *S. Yandes*, for the defendant.

THE STATE v. PERKINS.

CHALLENGE TO FIGHT.—The giving of a verbal challenge to fight a duel is an indictable offense.

ERROR to the *Lawrence* Circuit Court.

BLACKFORD, J.—Indictment against the defendant for giving to one *Lemon* a verbal challenge to fight a duel with guns, with intention to excite said *Lemon* to break the peace, &c.

The Circuit Court, on the defendant's motion, quashed the indictment.

The only objection made to the indictment is, that the challenge was a *verbal* one.

The language of the statute is, "that every person who may give or accept a challenge to fight a duel, or who shall agree, &c., shall, upon conviction thereof, be fined, &c." Rev. Stat., 1838, p. 211. It can not be material, under this statute, whether the challenge given be by words or in writing. The offense is in either case indictable. We know of no reason for any distinction, and, certainly, the statute makes none.

By the common law, it is as much an offense to [*21] give a *verbal challenge as it is to give a written one. The language of Lord *Coke* is, "And if any subject by word, writing, or message, challenge another to fight with him, this is also an offense before any combat be performed, and punishable by law; and it is *contra pacem, coronam, et dignitatem*." 3 Co. Inst., 158. *Hawkins* says, "that it is a very high offense to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, &c." 1 Hawk. Pl. Cr., 135. The law is also so stated in 4 Blacks. Comm., 150, and in 1 Russ. on Crimes, 396.

We think the indictment, in this case, ought not to have been quashed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

G. G. Dunn, for the defendant

Barickman, Administrator, v. Kuykendall, Administrator.

BARICKMAN, Administrator, v. KUYKENDALL, Administrator.

VENDOR AND PURCHASER—MINOR HEIRS—CONVEYANCE.—If a person who has contracted with another to convey to him certain real estate, die without having executed the conveyance, leaving several heirs, one of whom is a minor, the purchaser is not bound to accept a deed for the land from the adult heirs, and a bond of the guardian of the minor with surety, conditioned for the minor's conveyance when he shall come of age.

SAME—RESCISSION OF CONTRACT.—If a person enter into a legal contract for the purchase of real estate, pay part of the purchase-money, and occupy the premises some time under the contract, he can not, on the vendor's breach of his agreement to convey, rescind the contract, and recover back the money paid in *indebitatus assumpsit*; his only remedy, in such case, being on the special contract. (a)

STATUTE OF FRAUDS—RECEIPT.—A receipt for the purchase-money of real estate may constitute a sufficient agreement under the statute of frauds, provided it shows on its face, or by reference to some other instrument, every material part of a valid contract on the subject, but not otherwise. (b)

SAME.—The doctrine of Courts of equity, that payment of part of the purchase-money on a parol contract for real estate, and taking possession of the premises under the contract, is such a part of performance as takes the case out of the statute of frauds, does not prevail in courts of law.

RECOVERY BACK OF PURCHASE MONEY.—*Indebitatus assumpsit* lies to recover back money paid by a purchaser on a parol contract for real estate where the vendor or his heirs are unable or *fail to perform their part of the contract, notwithstanding the vendee may have occupied the land under the contract.

[*22] **PLEADING—PRACTICE.**—Assumpsit on a promise of the defendant's intestate; plea that the defendant did not promise, and issue. *Held*, that the issue was immaterial. *Held*, also that a replication to a plea of payment by the defendant's intestate, that the defendant did not pay, is bad. *Held*, also, that as the declaration only claimed money paid to the intestate, evidence of money paid to the defendant was inadmissible.

ERROR to the *Knox* Circuit Court.

BLACKFORD, J.—*Indebitatus assumpsit*. The declaration alleges that *Kuykendall*, the defendant's intestate, being indebted to *Harness*, the plaintiff's intestate, for money lent, money paid, and money had and received, promised to pay, &c. Pleas, 1, That the defendant did not assume, &c. 2,

(a) *Garr v. Lockridge*, 9 Ind., 92.

(b) 8 Ind., 92; 8 Blackf., 208; 7 Id., 452; 1 Ind., 88.

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That the intestate fully paid, &c. Replication to the second plea, that the defendant did not fully pay, &c.

The following are the facts proved on the trial: *Harness* contracted, by parol, with *N. Kuykendall* for the purchase of a tract of land, for which he was to pay *Kuykendall* \$900. He made a payment of \$500, and took a receipt as follows: "Received the 18th of *December*, 1837, of *Isaac Harness* \$500 in full for a hundred acres of land, in part payment. (Signed) *Nathaniel Kuykendall*. (Witness) *Jacob Kuykendall*." *Harness* took possession, repaired the fences, and cultivated the land. He went to *Vincennes* to get the conveyance, which was written, but, as the vendor died soon afterwards, it was not executed. Both parties, during their lives, were willing to complete the contract. *Harness* continued in possession until his death about the 1st of *January*, 1840, and his widow is still in possession. The use of the land is worth from \$120 to \$150 a year. After the vendor's death, *Harness* paid the defendant \$100 in part payment of the land. The vendor left several heirs, one of whom is a minor. The heirs of legal age have been willing, since their ancestor's death, to convey the land agreeably to the contract; and the guardian of the minor offered to give a bond with surety, conditioned that the minor should convey when he came of age.

Upon this evidence, the jury gave a verdict for the [*23] *defendant. A motion for a new trial was made and overruled, and judgment rendered on the verdict.

This case presents two questions for our consideration; first, does it appear that the plaintiff has any cause of action? if he has, then, secondly, has he selected the legal remedy?

We consider that the plaintiff was not bound to accept the deed and bond mentioned in the record. His intestate contracted not for such a deed and bond, but for the purpose of getting a good title for the land from the vendor or his heirs. And as the heirs, one being a minor, are unable to make the title, the plaintiff must have a remedy at law for the loss which the estate, of which he is the administrator, has sustained, in consequence of the non-compliance with the contract, on the

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faith of the performance of which his intestate paid the money sued for.

This brings us to the second question, whether *indebitatus assumpsit*, the remedy adopted by the plaintiff, is the proper form of action in the case?

The vendee having occupied the land several years under the contract—receiving the rents and profits—the parties can not be placed in the same situation they were in before the contract was made; and, consequently, if the contract be valid, the vendee could not rescind it, and sue in *indebitatus assumpsit* for the money paid. His remedy for a breach, in such case, could only be on the special contract. *Hunt v. Silk*, 5 East, 449; *Chitt. on Cont.*, 188; *Peters v. Gooch*, 4 Blackf., 515.

But if the contract was void, that doctrine has no application. The objection to the validity of the contract is, that it is for a title to land, and is not in writing as required by the statute of frauds. That statute enacts, that “no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged thereby, or some person by him thereunto lawfully authorized.” *Rev. Stat.*, 1838, p. 311.

Under this statute, which is copied from that of *Charles* [*24] the 2d, the instrument of writing, whatever *may be its form, must either show on its face, or by reference to some other instrument, every material part of a valid contract on the subject—such as the names of the parties, a description of the land, the amount of the purchase-money, &c. *Champion v. Plummer*, 1 New R., 252; *Blagden v. Bradbear*, 12 Ves., 471; 1 *Sugd. on Vend.*, 104, *et seq.*; *Bailey v. Ogden*, 3 Johns. R., 399; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R., 273; *Ellis v. Deadman's heirs*, 4 Bibb. 466.

The defendant insists that the receipt, signed by the vendor for part of the consideration money, is a sufficient writing to satisfy the statute; but that is not so. The receipt, it is true, is not objectionable as a contract within the statute, merely

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because it has the signature of but one of the parties; *Laythoarp v. Bryant*, 2 Bingh. N. Cas., 735; but it is objectionable as such contract, because it does not describe the land, and because it does not state the amount of the purchase-money, nor any of the other terms of the contract. To ascertain these particulars, recourse must be had to parol testimony, which the statute does not permit.

It is further insisted, that the vendee's payment of part of the purchase-money, and his taking possession of the land under the contract, was such a part performance as takes the case out of the statute of frauds. But supposing that to be the rule in a Court of chancery, it has no application to a Court of law. *Kidder v. Hunt*, 1 Pick. R., 328; *Thompson v. Gould*, 20 Pick. R., 134; *Adams v. Townsend*, 1 Metcalf's R., 483.

We consider, therefore, that the contract in question is within the statute of fraud, and can not be viewed in a Court of law as obligatory on the parties. That being so, the fact that the vendee occupied the land under the contract, which the defendant urges as an objection to the action of *indebitatus assumpsit* in this case, can not affect the suit. The ground of that objection, viz., that a vendee can not rescind a valid contract after such occupation, does not exist here, because no rescission is relied on by the plaintiff, there being no legal contract to rescind.

That an action of *indebitatus assumpsit* lies to re-
[*25] cover *back the money paid by a purchaser on a parol contract for real estate, where, as in the case before us, the vendor or his heirs are unable or fail to perform their part of the contract, has been frequently decided; and the ground of the decision is, that the defendant holds the money in his hands without consideration, and is bound to return it. *Gillet v. Maynard*, 5 Johns. R., 85; *Buck v. Waddle*, 1 Ohio R., 357; *Thompson v. Gould*, 20 Pick. R., 134; *Adams v. Fairbain*, 2 Stark. R., 277; *Gosbell v. Archer*, 4 Nev. & Mann., 485.

We are of opinion, therefore, that the evidence shows that the plaintiff has a good ground for the action he has brought.

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There are some other matters in this case which it is proper to notice. The suit is founded on a promise of the defendant's intestate; and the first plea is that the defendant did not promise. That plea is no answer to the cause of action, and the issue on it (to which all the evidence is limited) is immaterial. The second plea is payment by the defendant's intestate; and the replication to it, viz., that the defendant did not pay, is bad. The evidence that *Harness* paid \$100 on the land to the defendant, was inadmissible under the declaration, which only claims the money paid to the defendant's intestate.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

S. Judah, for the plaintiff.

C. Fletcher, O. Butler, S. Yandes, J. Law and *A. T. Ellis*, for the defendant.

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REPEAL OF STATUTE.—A judgment vesting in the State a title to land for the non-payment of taxes, rendered since the act of 1835 on the subject was repealed by that of 1839, is a nullity.

ERROR to the *St. Joseph* Circuit Court.

BLACKFORD, J.—At the *April* term, 1840, the [*26] Circuit Court *rendered judgment, on motion of the prosecuting attorney, that the title to the south-east quarter of section 33, township 37, range 4 east, should be vested in the State, certain taxes on the same not having been paid.

It appears by the affidavit of the plaintiff in error that he owned the land at the time of the judgment.

The statute of 1835, under which this judgment was rendered, was repealed previously to the rendition of the judgment, and the suit was *coram non judice*. Acts of 1839, p. 38. (1)

Henderson v. Barbee.

Per Curiam.—The judgment is reversed. To be certified, &c.

R. A. Lockwood, for the plaintiff.

H. O'Neal, for the State.

(1) Several other judgments for the State, in cases like that in the text, were reversed during this term.

HENDERSON v. BARBEE.

DEFECTIVE PLEADING.—A defendant can not object to a judgment against him, on the ground that his own pleading is defective.

PARTNERSHIP—CONTRACT.—If one of two partners, in the presence of the other and with his consent, subscribe the names of both to a note and put a seal to it, it is the deed of both.

SUBMITTING CAUSE TO COURT.—A cause having been submitted to the Court, under the statute, stands as if it had been submitted to a jury.

ERROR to the *Allen* Circuit.

BLACKFORD, J.—This was an action of debt brought by *William Barbee*, assignee of *Patrick C. Miller*, against *William J. Pope* and *Zenas Henderson*, trading under the firm of *W. J. Pope* and *Z. Henderson*. The declaration contains two counts, each founded on a sealed note dated the 26th of *May*, 1838, for the payment of \$175, and payable two years after date. The writ was served on *Henderson*, and returned “not found” as to *Pope*. *Henderson* pleaded to the action, that the writing obligatory in the declaration mentioned was not his deed, concluding to the country. The *plaintiff added the *similiter*. The cause was submitted, by consent, to the Court. Judgment against the defendant, *Henderson*, for \$175 debt and \$9.00 damages, making in all \$184, together with costs.

On the trial, the plaintiff proved that about the time the note was dated, *Henderson* and *Pope* were in partnership under the name of *W. J. Pope* and *Z. Henderson*; that in *January*, 1839, the dissolution of the partnership was adver-

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tised under the signature of the parties; that before the commencement of this suit, *Henderson* being informed by the witness, at the plaintiff's request, that *H. Cooper*, an attorney, held a note against *Pope* and *Henderson*, which had been assigned by *Patrick C. Miller* to the plaintiff, replied that it was all right, but that the plaintiff had agreed not to push him until he could collect the money from *Pope*, and that money was so scarce that he could not pay it then; that the witness did not show the note to *Henderson*. The plaintiff also proved by *H. Cooper* that before this suit was commenced, he received the note now produced in evidence from the plaintiff; that he called on *Henderson* and told him he had received such a note from the plaintiff, and demanded payment; that *Henderson* admitted the debt was just, but said he could not pay it then; that he did not show the note to *Henderson*. The plaintiff also proved that the signature to the note was in the hand-writing of *William J. Pope*; that the indorsement was in the hand-writing of *Patrick C. Miller*; and that the indorsement was filled up before the note came into the hands of *Cooper*.

The plaintiff then offered the note in evidence, which is as follows: "*Wolf Lake, May 26, 1838. Two years after date we promise to pay to P. C. Miller or order, the just sum of one hundred and seventy-five dollars, for value received, as witness our hands and seal. W. J. Pope and Z. Henderson, [SEAL].*" "*Pay the within to William Barbee. P. C. Miller.*" The defendant objected to the note as evidence, but the objection was overruled and the note read.

Upon this evidence the judgment was rendered.

The defendant's first objection to the judgment is, that the plea, though professing to answer the whole declaration, answers only one of the counts. Supposing that to

[*28] be so, it *is not for the defendant to object to the judgment against him, on the ground that his own pleading is defective.

The next objection is, that the evidence is not sufficient to show the defendant's execution of the note. We have here-

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tofore decided that one partner can not, merely by virtue of the partnership, bind his co-partner by deed. *Posey v. Bullitt*, 1 Blackf., 99. But we have also held, that two persons may make use of one seal, and it will be the seal of both. *Flood v. Yandes*, Idem. 102. And it has been decided, that if one of two partners subscribe the names of both to an instrument, and put a seal to it for them both, in the presence of the other and with his consent, it is the deed of both. *Ball v. Dunsterville*, 4 T. R., 313.

In the case before us, therefore, if the execution of the note by *Pope* was in *Henderson's* presence and with his consent, it is the deed of both; and it appears to us, that a jury might reasonably infer, from the evidence, that the note had been so executed. The cause having been submitted to the Court, under the statute, stands as if it had been submitted to a jury.

Per Curiam.—The judgment is affirmed with costs.

D. H. Colerick and *W. H. Coombs*, for the plaintiff.

H. Cooper, for the defendant.

WELLS v. RAWLINGS.

ESCAPE.—Debt against a sheriff for an escape on execution. Plea, that the execution-defendant being in custody, &c., made oath that he had no property, &c., that before the oath was administered, the plaintiff not being resident in the county, the defendant posted up in the clerk's office a written notice of the time and place of taking the oath; and that the execution-defendant was thereupon discharged, &c. Held, that the plea was insufficient, for not stating that the plaintiff had no agent or attorney in the county, and for not showing that the notice contained the name of the officer before whom the oath was taken.

ERROR to the *Scott Circuit Court*.

SULLIVAN, J.—This was an action of debt for the escape of one *Thomas Miranda* arrested by the defendant, [*29] who *was the sheriff of the county of *Scott*, on a *ca. sa.*, at the suit of the plaintiff. The declaration was in the usual form. The defendant pleaded three pleas. The

third plea was founded on the 18th section of the execution law, Rev. Stat., 1838, p. 281, and states that *Miranda* being in the custody of the defendant by virtue of a *ca. sa.*, made oath before *J. W. Reed*, a justice of the peace of *Scott* county, that he had no property, real or personal, subject to execution, and no rights, credits, moneys, or effects in his possession or under his control, &c.; that he had not either directly or indirectly disposed of, transferred, or concealed any of his property, &c., with intent to defraud his creditors; that previous to administering said oath, the plaintiff not being a resident of the county, the defendant posted up in the clerk's office of said county a written notice of the time and place of administering it; that he thereupon discharged said *Miranda* as he lawfully might, &c. The plaintiff filed a general demurrer to the plea, which was overruled by the Court. The defendant thereupon withdrew his first and second pleas, and final judgment was given for the defendant.

The only question in the case is as to the sufficiency of the third plea.

The defendant having arrested *Miranda*, was bound to keep him safely until discharged by due course of law. One of the modes by which a debtor arrested on a *ca. sa.* may be legally discharged, is pointed out in the statute on which the defendant relies.

The statute makes it the duty of the sheriff or other officer making the arrest, to give notice to the plaintiff, his agent, or attorney, of the time and place of taking the oath, and of the person before whom the oath is intended to be taken. If neither the plaintiff, his agent, or attorney reside in the county, "such notice" shall be posted up in the clerk's office.

The plea is defective, because it does not show that the notice required by the statute was given by the defendant. The plea avers that the plaintiff in execution was not a resident of the county, and that notice of the time and place of taking the oath was posted up in the clerk's office. The plaintiff, though he did not reside in the county, may have had an agent or attorney residing there. If he had, the

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[*30] notice should have been served upon him; if he had not, the *plea should have shown it. The notice was insufficient also, because it did not inform the plaintiff before whom the oath would be taken. The statute expressly requires that the notice shall contain that information.

The statute referred to provides for the discharge of a debtor by a short and summary proceeding, and to guard against fraud, it is necessary that all its requirements be observed.

The Court erred in overruling the demurrer to the plea.

Per Curiam.—The judgment is reversed and the proceedings subsequent to the demurrer set aside, with costs. Cause remanded, &c.

M. G. Bright and G. Robinson, for the plaintiff.

J. G. Marshall, for the defendant.

 MILLER v. BOTTORFF and Another.

INDORSEMENT OF BAIL—EVIDENCE.—An indorsement of a recognizance of bail on a *capias ad respondendum* returned to the clerk's office—the defendant not being a party to the recognizance—is no evidence of the service of the writ.

JUDGMENT BY DEFAULT—RECORD.—In case of a judgment by default, the record must show that the defendant had notice of the suit.(a)

ERROR to the *Morgan* Circuit Court.

SULLIVAN, J.—Debt by *Bottorff* and another against *Miller* on a promissory note, and judgment by default.

The only error assigned is, that the record does not show that the defendant in the Circuit Court had notice of the suit.

The *capias ad respondendum* was returned to the clerk's office, with a recognizance of bail indorsed thereon according to the form prescribed by the statute, and signed by one *Jonathan Hunt*. This was the only indorsement on the writ, and

(a) *The N. A. & S. R. R. Co. v. Welsh*, 9 Ind., 480.

The State v. Duzan.

the Circuit Court had no other evidence of service than that which it contained.

It is contended that the indorsement on the writ is *prima facie* evidence of service on the defendant. We think not. The defendant was not a party to the recognizance. It may have been taken, and the defendant contends it was [*31] taken *without his knowledge or consent. It therefore furnishes no evidence whatever against him. Were he a party to it, the presumption would be otherwise. To regard such an indorsement as legal evidence of the service of process, would be to encourage fraud and collusion.

It is the duty of a sheriff, in such cases, to execute the process according to the command of the writ, and to return it with his doings on the return day.

As the record does not show that the defendant had notice of the suit, the judgment is erroneous. *Bliss v. Wilson*, 4 Blackf., 169.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the plaintiff.

C. Fletcher, O. Butler, and S. Yandes, for the defendants.

THE STATE v. DUZAN.

CONCEALED WEAPONS—INDICTMENT.—An indictment for carrying a pistol concealed, &c., need not state that the pistol was loaded.

ERROR to the Boone Circuit Court.

BLACKFORD, J.—Indictment. The charge is, that on, &c., at, &c., and on divers other days and times, &c., the defendant did then and there unlawfully carry concealed in his pocket a certain dangerous weapon, viz., a certain pistol, he not being a traveler; contrary to the statute, &c. The Circuit Court, on the defendant's motion, quashed the indictment.

We think this indictment is good. The objection, that the

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pistol is not stated to have been loaded, is insufficient. The statute says, "that every person, &c., who shall wear or carry any dirk, pistol, sword in cane, or other dangerous weapon concealed, shall &c." Rev. Stat., 1838, p. 217. The statute does not require that the pistol should be loaded.

32*] **Per Curiam*.—The judgment is reversed with costs.

Cause remanded, &c.

H. O'Neal, for the State.

W. Quarles and C. C. Nave, for the defendant.

GRAHAM and Others v. THE STATE for the use of PATTON and Another

CONSTABLES BOND—SUIT ON.—In a suit on a constable's bond because of the illegality and insufficiency of the constable's return to a *feri facias*, the declaration should show what the return was which is alleged to be illegal and insufficient.

SAME—PLEADING.—If a declaration in such suit setting out the condition of the bond, &c., be demurred to, and the demurrer be overruled, the damages should be assessed by a jury.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State, for the use of *Patton* and *Winton*, on a constable's bond. The suit is against the constable and his sureties. The declaration alleges as a breach of the condition of the bond, that *Patton* and *Winton* had obtained a judgment before a justice of the peace against *Huff*; that a *feri facias* issued on the judgment, and was delivered to the constable to be executed; "that the constable made an illegal service and return of the execution, neither making the money nor giving any legal and satisfactory reason in his return for failing to make the money;" all which is contrary to the statute, &c.

General demurrer to the declaration; demurrer overruled; and final judgment rendered for the plaintiff.

This declaration can not be supported. The statute authorizes

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a suit on a constable's bond, if he fail to return an execution or to pay over money collected on it, or if he make a false return. Rev. Stat., 1838, p. 148. The breach of the officer's duty assigned in the declaration before us, is his making an illegal and insufficient return to the execution. This assignment is de-

[*33] fective, because it does not inform us what the return was which the officer made, and which the *plaintiff considers illegal and insufficient. It merely states a conclusion of law, instead of setting out the facts from which that conclusion is drawn, which is contrary to the first principles of pleading. 1 Chitt. Plead., 244.

There is another error in this case. The damages should have been assessed by a jury, and not by the Court. Rev. Stat., 1838, p. 449.

Per Curiam.—The judgment is reversed at the costs of the relators. Cause remanded, &c.

W. M. Jenners and R. A. Chandler, for the plaintiffs.

J. Pettit, for the defendant.

SNYDER v. NORRIS.

REPLEVIN BAIL—EVIDENCE.—*Scire facias* against replevin bail entered on the docket of a justice of the peace. Pleas, 1, No execution issued against the goods of the principal; 2, *Non est factum*. Held, that the issues on the plaintiff's part must be proved, not by a transcript from the justice's docket, but by producing the execution or a certified copy of it, and proving the execution of the entry of bail as the execution of other instruments of writing is required to be proved.(a)

ERROR to the Union Circuit Court.

SULLIVAN, J.—*Scire facias* by Norris against Snyder, as replevin bail for one Ferguson, on a judgment before a justice of the peace. The suit was commenced before a justice, and judgment was rendered against Snyder by default. An appeal

(a) *Stinson v. The State*, 2 Ind., 434.

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was taken to the Circuit Court, where *Snyder*, by leave of the Court, filed the following pleas, viz.: 1, No execution had been issued against the goods and chattels of *Ferguson*, the judgment debtor, previous to the commencement of the suit; 2, *Non est factum*.

On the trial of the cause, the plaintiff offered in evidence a transcript from the justice's docket to prove the judgment against *Ferguson*, the replevy of that judgment by *Snyder*, and that an execution had been issued against the goods and chattels of *Ferguson*, and had been returned *nulla bona*. The

[*34] defendant objected, but the Court admitted the *testimony. This was all the proof offered by the plaintiff.

The defendant thereupon offered to prove, that previous to the commencement of this suit, no execution had issued against the goods and chattels of *Ferguson*, but the Court refused to admit the testimony. He also offered to prove that he did not replevy said judgment as alleged in the *scire facias*, which proof the Court also rejected. To the opinion of the Court refusing said testimony the defendant excepted. The Court thereupon gave judgment for the plaintiff.

To fix the liability of bail for the stay of execution on a judgment rendered by a justice of the peace, an execution must issue against the goods and chattels of the judgment-debtor, and it must be returned that there are not goods and chattels sufficient to satisfy the writ. These facts must be proved on the trial, by the best evidence of which their nature is capable. The writ itself or a certified copy of it, is obviously the best proof. A transcript from the justice's docket is not sufficient.

Under the plea of *non est factum*, it was, for the same reason, necessary for the plaintiff to prove the execution of the entry on the justice's docket, by which he sought to make the defendant liable. It should have been produced on the trial and its execution proved, as the execution of other instruments is proved, under that plea.

The testimony adduced by the plaintiff was, therefore, not sufficient on either issue to sustain the judgment of the Court.

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And it follows from what has been said, that the testimony offered by the defendant was appropriate to the issues, and ought to have been received.

There is a third plea in the record, which it is not necessary to notice in this opinion; because the defendant can avail himself of the facts stated in it, under the plea of *non est factum*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. W. Parker, for the plaintiff.

C. H. Test, for the defendant.

[*35]

*PRENTISS v. HINTON.

CAPIAS—DISCHARGE—EFFECT OF.—A discharge, with the plaintiff's consent, of a defendant in custody on a *capias ad satisfaciendum*, operates as a discharge of the judgment. *Aliter*, if the discharge from custody be on account of the plaintiff's non-payment of the jailer's fees.(a)

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—*Hinton* brought an action of trespass on the case against *Prentiss*, alleging that *Prentiss* on, &c., as the pretended agent of one *Bowser*, unlawfully and oppressively caused to be issued against his goods and chattels, a writ of *feri facias* on a judgment in favour of said *Bowser* against him (*Hinton*), by virtue of which a certain bay mare, the property of *Hinton*, was levied on and sold; that at the sale, *Prentiss* became the purchaser of the mare at a reduced price; that previous to issuing said writ, *Hinton* had been arrested by virtue of a *capias ad satisfaciendum* issued on the same judgment, and had been discharged by *Bowser*; all of which was well known by *Prentiss* at the time of issuing said *feri facias*, at the time of the sale, &c.

The defendant pleaded the general issue with leave to

(a) *Wakeman v. Jones*, 1 Ind., 517.

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the special matter in evidence. Verdict and judgment for the plaintiff.

The Court gave the following instructions to the jury: 1, If a defendant be arrested on a *capias ad satisfaciendum*, and be discharged by the plaintiff, or by his default in paying the jailer's fees when legally required, the judgment is satisfied, and an execution afterwards issued thereon will be null and void; 2, If the defendant were discharged by the sheriff, because the plaintiff refused to pay his fees, it was a satisfaction of the judgment, such refusal amounting to consent to the defendant's discharge. To the opinion of the Court contained in these instructions, the defendant excepted.

The common law principle is, that if a debtor who is in custody on a *ca. sa.* be discharged with the plaintiff's assent, it operates as a discharge of the judgment. But this Court has decided, that the discharge of a debtor in execution because the plaintiff refuses to pay the prison fees, is not a discharge with the consent of the plaintiff. *Tatum v. Potts et al.*,

May term, 1841. In *England*, a discharge under the [*36] *insolvent debtor's act, on the refusal of the plaintiff to pay the prison fees, is decided not to be a discharge with the plaintiff's assent. *Nadin v. Battie et al.*, 5 East, 147, Those cases decide the present case, and show the instructions of the Court to be erroneous.

The evidence is not spread upon the record, but we presume the instructions were applicable to the case, and being erroneous, may have led the jury to return a wrong verdict.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and *W. H. Coombs*, for the plaintiff.

H. Cooper, for the defendant.

Williams, Claimant, v. The State.

WILLIAMS, Claimant, v. THE STATE.

TAX TITLE.—To authorize a judgment vesting the title to land in the State, under the act of 1835, for the non-payment of taxes, there must be proof that all the requisites of the law have been complied with; and the evidence on the subject must appear in the record.^(a)

ERROR to the *Franklin* Circuit Court.

BLACKFORD, J.—At the *April* term of the Circuit Court, 1836, the prosecuting attorney filed a list of lands and town lots, containing lots numbered forty and forty-one, in *Brookville*, on which it is alleged that taxes for the year 1832 had not been paid, and moved that the title to the lots should be vested in the State. It was proved, in support of the motion, that the list thus filed was a correct list of the lands and town lots situate in *Franklin* county, and returned to the school commissioner by the collector for 1832, on which the taxes for that year had not been paid, and which had not been subsequently redeemed. It was proved, also, that the list and notice of the motion had been published in conformity with the law. The motion was sustained.

An affidavit has since been made, on behalf of the plaintiff in error, that the lots in question belonged to him.

This judgment must be reversed. The statute of 1835, under which this proceeding was instituted, contains
[*37] no *provision affecting the general rule respecting the proof of tax titles. That rule is, that the claimant under such title must prove that all the requisites of the law have been complied with.

In the present case, none of the proceedings, required by law to take place previously to the collector's return, were proved; and for that defect in the proof, the motion of the prosecuting attorney should have been overruled. Unless the steps, which the law required to be taken as well before as after the collector's return, had been regularly pursued, the Circuit Court had

(a) *Barnes v. Doe*, 4 Ind., 133; 11 Id., 2.

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no jurisdiction, under the statute, to divest the plaintiff in error of his property and vest it in the State; and in order that an appellate Court may know whether the jurisdiction existed, the evidence of the facts by virtue of which it was claimed, should be spread on the record. This is a strict construction of the law, but we think it is fully authorized by the nature and consequences of the proceeding.(1)

Per Curiam.—The judgment is reversed. Cause remanded, &c.

G. Holland, for the plaintiff.

H. O'Neal, for the State.

(1) Several decisions similar to that in the text were made in other cases during the term. The statute of 1835, under which these proceedings took place, is now repealed. Acts of 1839, p. 38.

THE STATE *v.* SCAGGS and Others.

RIOT.—If three or more persons do an unlawful act of violence—as if they violently and unlawfully burst open the door of another person's dwelling-house, &c., the offense is indictable under the statute.

ERROR to the *Morgan* Circuit Court.

BLACKFORD, J.—Indictment for a riot. First count: That *James Scaggs, jun., Thomas Scaggs, William Huff*, and *Jackson Trent*, late of, &c., labourers, on, &c., at, &c., with force and arms, in a riotous, violent, and unlawful manner, [*38] *did then and there violently and unlawfully burst open the outer door of the dwelling-house of one *Thomas Smith*, situate, &c., and did then and there tear down and carry off one of the window-shutters of and from said dwelling-house; contrary to the form of the statute, &c. Second count: That said *James Scaggs, jun., Thomas Scaggs, William Huff*, and *Jackson Trent*, late of, &c., yeomen, on, &c., at, &c., did then and there actually do an unlawful act of violence

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in a violent and tumultuous manner, by then and there unlawfully and violently taking away a certain window-shutter, and bursting open the door to a certain dwelling-house, situate, &c., and then and there owned and occupied by one *Thomas Smith*; and by then and there throwing clubs, stones, and brick-bats on and against said house, and by then and there committing an assault on said *Thomas Smith*; contrary to the form of the statute, &c.

The Circuit Court, on the defendant's motion, quashed the indictment.

The statute upon which this indictment is founded, says, "that if three or more persons shall actually do an unlawful act of violence, either with or without a common cause or quarrel, or even do a lawful act in a violent and tumultuous manner, they shall be deemed guilty of a riot; and upon conviction," &c. Rev. Stat., 1838, p. 213.

We think that, under this statute, both the counts of the indictment are good.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

H. Brown, for the defendants.

[*39]

*HURD v. EARL.

PLEADING—PRACTICE.—If one of several replications to a plea of payment and set-off be good, it is sufficient to sustain the action.

SAME.—To a plea of payment and set-off, relying upon a note executed by the plaintiff to a third person and assigned to the defendant, the plaintiff may reply that the assignment was obtained by fraud.(a)

ERROR to the *St. Joseph* Circuit Court.

(a) *Bates v. Pucket*, 5 Ind., 22.

Hurd v. Earl.

DEWEY, J.—Assumpsit for work and labour. The defendant pleaded the general issue, and the statutory plea of payment and set-off alleging that the plaintiff had executed certain notes to one *Fullender*, who indorsed them to the defendant. The plaintiff filed three replications to the special plea: 1, That the plaintiff and defendant were in partnership, and purchased pork of *Fullender* for the use of the firm; that for a part of the pork so purchased, the notes mentioned in the plea were given; and that the defendant had procured them to be assigned to him by fraud; 2, The same, with an additional averment that the notes had been paid before the fraudulent assignment took place; 3, A traverse of the payment alleged in the plea, with an affidavit appended that the notes were not assigned before the commencement of the suit. The defendant demurred to the first and second replications, and took issue on the third. The Circuit Court overruled the first demurrer, and sustained the second. There was a trial of the issues of fact by the Court. Judgment for the plaintiff.

Although the statute allows several replications to a plea of payment containing matter of set-off, yet if one of several replications to such a plea be good, it is sufficient to sustain the action. *Stipp v. The Washington Hall Co.*, November term, 1840. The finding by the Court in favour of the plaintiff upon the issue joined upon the third replication, consequently, renders it immaterial whether the other replications be good or bad. But the first replication, which was sustained by the Court, to say nothing of the second, which was overruled, is a good answer to the plea. It alleges fraud in the assignment of the notes which the defendant set up by way of set-off. It

is competent for the maker of a note, or the acceptor of [*40] a bill, in an action against him by the indorsee, to *impeach the title of the latter, by showing that he became the holder of the instrument by fraudulent means. *Rees v. Headfort*, 2 Campb., 574; *Reynolds v. Chettle*, Ib., 596; *Delaney v. Mitchell*, 1 Stark. R., 439; *Gill v. Cubitt*, 3 B. & C., 466; *Talman v. Gibson*, 1 Hall, 308. There is no error in the judgment.

Wells v. Jackson.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. Pettit, for the plaintiff.

J. A. Liston and *H. Cooper*, for the defendant.

WELLS v. JACKSON.

ASSIGNMENT OF BOND—LIABILITY OF ASSIGNOR.—If a defendant, sued as the obligor of a bond, do not appear to be a party to the bond shown on *oyer*, a demurrer to the declaration must, of course, be sustained.

SAME.—If a bond assignable by statute, or a negotiable note, be indorsed in blank by a third person at the date of the contract, and be afterwards delivered to the payee, the indorser is not responsible as an original promiser to the payee, without extrinsic evidence to show that such was the design of the indorsement; his liability, in the absence of extrinsic testimony, being only that of an ordinary indorser.^(a)

SAME.—But if the instrument so indorsed and delivered be not assignable, the payee may hold the indorser liable on the original contract as a surety, unless it appear by extrinsic evidence that the intention of the parties was otherwise.

SAME—EVIDENCE.—In a suit by the payee against the indorser in blank of an assignable instrument, charging the defendant as primarily liable, the instrument and indorsement, though not of themselves sufficient to sustain the suit, are a necessary part of the plaintiff's evidence.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—*Wells* sued *Jackson* in debt. The first count of the declaration alleges that the defendant made his writing obligatory, and thereby bound himself to pay the plaintiff \$10,000. The second count states that the defendant made his "certain instrument in writing," whereby he promised to pay the plaintiff the same amount. The third count sets out a writing obligatory executed by one *Ferris Pell* to the plaintiff for \$10,000, and then avers that the defendant

[*41] placed his name upon this instrument, and *delivered it thus indorsed to the plaintiff. The defendant

(a) Overruled by *Drake v. Maske*, 21 Ind., 433.

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craved *oyer* of the writing obligatory mentioned in the first count, and of the condition thereto annexed. The writing obligatory, given in *oyer*, was a bond executed by *Ferris Pell* in the penalty of \$10,000, conditioned for the payment of \$5,000 by him to the plaintiff. The defendant demurred generally to the first count. He also craved *oyer* of the bond described in the third count, and of its condition. The instrument exhibited on this occasion was, in all respects, like that just mentioned, except that it was indorsed, in the order here stated, by *Ed. H. Lytle*, *Francis D. Swords*, and the defendant. General demurrer to the third count. To the second count the defendant pleaded the general issue. The Court sustained both demurrers. On the trial of the issue of fact formed upon the second count, the plaintiff offered in evidence the same writing obligatory, with its indorsements, which had been given in *oyer* on the demurrer to the third count. The defendant objecting to its admissibility, the Court rejected it. Judgment for the defendant.

That the demurrer to the first count was correctly sustained admits of no doubt. The bond which was given in *oyer* on that count was executed by *Ferris Pell*. No indorsement appearing upon it, there was nothing to show that the defendant had any connection whatever with the obligation.

The bond of *Pell*, together with its indorsements, becoming, in consequence of the *oyer*, a part of the third count, the demurrer to that count raises the question, what is the legal effect of a blank indorsement of negotiable paper, by a third person, while the instrument remains in the hands of the payee?

We shall confine our attention to the question of the liability arising from such an indorsement without inquiring whether this count is, in other respects, defective or not.

The plaintiff contends, the person indorsing is responsible as an original promiser according to the tenor of the indorsed contract. He has cited several decisions by the Supreme Court of *Massachusetts* in support of this position. And it must be admitted, that those decisions do establish the

[*42] *doctrine, that a blank indorsement by a third person of unnegotiable paper, or negotiable paper which has not been transferred by the payee, does, *prima facie*, render the person so indorsing liable on the original contract as a surety thereto, in the same manner as if his name had been upon the face of the instrument; provided the indorsement be made at the date of the contract. But this presumption is liable to be rebutted by proof that the indorser designed to become collaterally bound only, and gave no authority to charge him in any other manner; *Josselyn v. Amies*, 3 Mass., 274; *Carver v. Warren*, 5 Mass., 545; *White v. Howland*, 9 Mass., 314; *Moies v. Bird*, 11 Mass., 436; *Baker v. Briggs*, 3 Pick., 122. In *New York* a somewhat different principle prevails. It has been held by the Courts of that State, that such an indorsement as the one under consideration, if made upon negotiable paper, does not of itself render the indorser primarily liable; but that the presumption is, that he indorsed with the expectation of looking for indemnity to the responsibility of both the maker and the payee as the first indorser. But that, nevertheless, he may be rendered liable as an original undertaker or surety, provided it be shown by proof, that his object was to give the maker of the note credit with the payee. In which case, an authority would be conferred upon the latter to hold the indorser primarily liable; as much so, as if he had signed the body of the instrument. *Herriek v. Carman*, 12 Johns., 159; *Nelson v. Dubois*, 13 Johns., 175; *Campbell v. Butler*, 14 Johns., 349; *Tillman v. Wheeler*, 17 Johns., 326. In *England*, it seems to be settled that the indorser of a note, not negotiable, may be held liable as the maker of a new note, if the necessary stamp be affixed to the indorsement. *Plimbley v. Westley*, 2 Bingh., N. C., 249. But if the note be negotiable, the payee can not sustain an action against the person who has indorsed it, as the maker. His liability is collateral. *Gwinnell v. Herbert*, 5 Adol. & Ellis, 436.

The deduction which we draw from these authorities is, that the blank indorsement of unnegotiable paper, made at the date of the contract, and unexplained by extrinsic testi-

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mony, confers upon the payee the authority to hold [*43] the *indorser liable on the original contract, as a surety; and that a similar unexplained indorsement of negotiable paper renders the indorser liable only as indorser, with the ordinary rights and privileges incident to that character. But that in either case, the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind. And this appears to us to be also the common sense view of the subject.

The bond described in the third count, and given on *oyer*, is, by the law of this State, transferable from hand to hand by indorsement, and therefore bears, in this respect, the character of mercantile paper. The defendant is the last of three indorsers, and must be presumed, agreeably to the principles laid down, to have placed his name upon the bond in the character of an ordinary indorser, looking to the responsibility of those whose names precede his, including the payee and maker. As the count under consideration attempts to hold the defendant primarily liable, it is defective; and the demurrer to it was correctly sustained.

The Circuit Court, however, erred in excluding the bond with its indorsements, as evidence under the issue of fact formed upon the second count. That count charges, that the defendant made his "certain instrument in writing" and thereby promised, &c. Although the defendant's indorsement may not, of itself, be sufficient to charge him with the payment of the money according to the tenor of the bond, yet as the plaintiff had a right to show, by explanatory circumstances, the liability really assumed by the defendant, the bond and indorsements became a necessary link in the chain of evidence, and should not have been excluded.

The declaration contains three other counts, founded upon a second bond, similar to those which we have stated, and upon which similar proceedings were had. The fifth count corresponds with the second.

Niles v. Porter.

[*44] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Lockwood and D. Mace, for the plaintiff.

J. Pettit, for the defendant.

THE STATE, on the Relation of AKER, v. KIZER and Others,
in Error.

AN action of debt was brought by the State, on the relation of *Aker*, on a bond for the payment of money. The bond shown on *oyer* was conditioned that a certain collector should faithfully discharge his duties, &c. *Held*, on demurrer, that the declaration was not objectionable for not setting out the condition and breaches. *Evans et al. v. The State*, 2 Blackf., 387. *Held*, also, that the declaration not setting out the condition, &c., need not show that the relator was beneficially interested in the suit. *The State, ex rel. Naylor et. al. v. Harding et al.*, May term, 1841.

NILES v. PORTER.

NOTE PAYABLE IN BANK—LIABILITY OF INDORSER.—If the payee and owner of a promissory note negotiable and payable at a chartered bank within the State, indorse it to a third person, and be afterwards sued by the latter on the indorsement, he may defeat the suit by showing that the indorsement was made without consideration; and a plea to that effect, stating also that the note was not designed to be negotiated in bank, &c., is not objectionable for duplicity.

SAME.—But if the indorsement of such note—the indorser not, being the owner, be made for the maker's accommodation, and the indorser be sued by a *bona fide* holder for value who received the note before it was due, the want of consideration for the indorsement is no defense to the suit, though the plaintiff knew, when he received the note, for what purpose the indorsement was made; and the circumstance that the note was not out in circulation, &c., makes no difference.

Niles v. Porter.

[*45] *APPEAL from the *LaPorte* Circuit Court.

DEWEY, J.—*Porter*, as the indorsee, sued *Niles* as the indorser of a promissory note made by *Polke*, payable to *Niles* or order at ninety days, and negotiable at the *Indianapolis* branch of the State Bank. *Niles* pleaded the general issue and four special pleas. Issues of fact were formed upon all the pleas excepting the two last, the fourth and fifth, to which *Porter* demurred specially.

The fourth plea alleges, "that the note was assigned and indorsed by the defendant to the plaintiff, as a voluntary act without any good and valuable consideration for the assignment, and that no consideration whatever was ever, at any time, received by the defendant for the indorsement, either from *Polke* or the plaintiff; and that the note was not intended for negotiation in bank, and was not negotiated there, but was assigned directly by the defendant to the plaintiff, who well knew that the assignment was made without any consideration." The cause of demurrer assigned is duplicity in alleging that the assignment of the note was without consideration, and in averring that the note was not designed to be negotiated in bank and was not there negotiated.

The fifth plea is, that the note was executed by *Polke* and indorsed by the defendant, at the request of the plaintiff, in the place of a former note for the same amount which the plaintiff held against *Polke*; that no consideration for the indorsement passed from the plaintiff or *Polke* to the defendant; and that the note was not designed to be negotiated in bank, &c., as in the fourth plea. Cause of demurrer same as above stated.

The Circuit Court sustained both demurrers, and, on the trial of the issues of fact, rendered final judgment in favour of the plaintiff for the amount of the note.

The note in question, being payable and negotiable at a chartered bank in this State, is governed by the law merchant. And the fourth plea presents the inquiry, whether the indorser of such a note can, in an action by his immediate indorsee, impeach the consideration of the transfer. Elementary writers, correctly as we believe, represent the law to be, that in ac-

[*46] tions between the immediate parties to *a bill of exchange or note, as the drawer and acceptor of the bill, the payee and maker of the note, or the indorsee and *his* indorser of either instrument, the consideration of the cause of action may be inquired into; and if none exist, the action must fail. Chitt. on Cont., 23; Chitt. on Bills, 81; Bayley on Bills, 499. The defendant in this cause is the payee and indorser of the note, and must, under the plea which we are considering, be presumed to be the original holder and owner of it; and as the demurrer admits that it was transferred to the plaintiff without any consideration whatever, the suit can not be sustained. The plea constitutes a good defense. The objection of duplicity is without foundation. The averment respecting maker. By this plea it appears that the defendant never was the holder or owner of the note, but that he lent his name and credit for the benefit of the maker. The question here is, whether any other consideration than that which passed between the plaintiff and the maker is necessary to fix the defendant's liability on his indorsement? The acceptor of a bill for the accommodation of the drawer is liable to a *bona fide* holder for value, though the latter took it knowing that the acceptance was without consideration. *Smith v. Knox*, 3 Esp. R., 46: the intention of the parties in regard to the negotiation of the note in bank, &c., is immaterial, and may be regarded as surplusage. The demurrer to the fourth plea should have been overruled.

The fifth plea stands on different ground. It presents the case of the indorser of a note for the accommodation of the *Charles et al. v. Marsden*, 1 Taunt., 224; *Adams v. Gregg*, 2 Stark. R., 531; *Woodroffe v. Hayne*, 1 C. & P., 600; *Ireland Bank v. Beresford*, 6 Dow. 237. These decisions are founded on the policy of the law in favour of commerce, which forbids a person to give credit and circulation to negotiable paper by his name, and then object against a fair holder for a valuable consideration, that his signature was without consideration. The same principle is applicable to the indorser of a promissory note for the accommodation of the maker. *Smith et al. v. Becket*,

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13 East, 187; *Brown v. Mott*, 7 Johns., 361. The circumstances that the note in question was never put in circulation by the plaintiff, *and that he advanced no money for it at the time he became the holder, can not avail the defendant. The pre-existing debt due the plaintiff from the maker was a good consideration. The execution and indorsement of the note were one entire transaction, the indorser standing in the relation of the surety of the maker, with the rights and privileges, however, of an ordinary indorser. The demurrer to this plea was correctly sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles, for the appellant.

C. Fletcher, O. Butler, and S. Yandes, for the appellee.

ROBB v. VICORY and Another.

CONTRACT—CONSTRUCTION OF.—Debt against *A* and *B* on a sealed note payable the first of *June*, 1837. Plea, that certain land has been bought for the joint use of the plaintiff and defendants, the purchase-money advanced by the former, and the title taken in his name; that the note was given by the defendants for their part (two-thirds) of the purchase-money; that the land was to be sold as soon as it could be done to the satisfaction of a majority; that when the plaintiff should be paid the note, and his part (one-third) of the proceeds, he should convey, &c.; that the land had not been sold, nor had the plaintiff conveyed or tendered a conveyance to the defendants, &c. *Held*, that the plea was insufficient, the defendant's promise to pay the money advanced for them by the plaintiff being independent, &c.

APPEAL from the *LaPorte* Circuit Court.

SULLIVAN, J.—Debt by *Robb* against *Vicory* and *Lacy* on three writings obligatory. There are three counts in the declaration. The first is on a note for the sum of \$1,023, payable on the first of *June*, 1837; the second is on a note for the sum of \$353, payable at the same time; and the third is on a note for \$350, also payable on the first of *June*, 1837. The defend-

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ants pleaded separately to each count. The plea to the first count recites a covenant entered into on the 19th of *October*, 1836, between the plaintiff and the defendants, by [*48] which it is agreed that certain *public land, selected and designated by the defendants, had been purchased from the government for the joint use and benefit of the said *Robb*, *Vicory*, and *Lacy*; that the purchase-money had been advanced by *Robb* and the land purchased in his name, and that the note in said count mentioned was given by *Vicory* and *Lacy* to the plaintiff for their proportion of the purchase-money; that said land was to be sold so soon as it could be done to the satisfaction of a majority; and that when *Robb* should be fully paid the amount of said note, and his equal third part of the proceeds, he should make deeds to the purchasers, &c. The plea then avers, that the note in said count mentioned was given to *Robb* for two-thirds of the amount of the purchase-money of said land; that the legal title to said land was, at the time of the execution of said note, and still is, in said *Robb*; that no sale of said land or any part of it has been made; and that said plaintiff has not conveyed nor tendered a conveyance to the defendants for said land. Wherefore, &c.

The plea to the second count was in all respects similar to the plea to the first count. To the third count, the defendants pleaded payment. The plaintiff replied denying the payment. On that issue, there was judgment for the plaintiff.

To the pleas to the first and second counts the plaintiff demurred. The Court overruled the demurrers and gave judgment for the defendants. This appeal is taken from the judgment of the Court overruling the demurrers.

The promise of the defendants to pay to the plaintiff their proportion of the money advanced by him to purchase the land, was entirely independent of the obligation on his part to convey. They promised to pay, unconditionally, on the first day of *June* next following the contract; he bound himself to convey when sales should be made by a majority of the owners of the land. The period at which the money was to be paid, was

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fixed and certain; the event on which the conveyance was to be made was uncertain and contingent. The acts to be performed were not concurrent, and there was therefore no legal obligation on *Robb* to convey, or offer to convey, before suit brought for the debt due him.

It is moreover apparent from the agreement, set up [*49] in the *plea, that it was the intention of the parties that *Robb* should hold the title to the lands as an indemnity for his advances.

If this were a sale of land by *Robb* to the defendants, and the deed were to be made to them at the time fixed for the payment of the purchase-money, the acts to be performed would in that case be concurrent, and the plaintiff could not recover without performance or an offer to perform on his part. But there was, manifestly, no such sale. The notes were not given in consideration of land sold, but in consideration of so much money advanced by *Robb* for the use of the defendants.

We are of opinion, that the facts stated in the defendants' first and second pleas present no bar to the plaintiff's action, and that the Court erred in overruling the demurrers.

Per Curiam.—The judgment is reversed with costs. Cause, remanded, &c.

J. B. Niles, for the appellant.

THE STATE v. McDOWELL.

INDICTMENT.—A description of the defendant in an indictment by the addition of his degree, or mystery, and place of residence, is not necessary in this State.

ERROR to the *Vanderburgh* Circuit Court.

DEWEY, J.—This was a prosecution against a justice of the peace for oppression under colour of his office. The Circuit Court quashed the indictment on the motion of the defendant.

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The objection urged against the indictment is, that the defendant is not described by the addition of his degree, or mystery, and place of residence.

By the common law no *addition* was required in indictments against persons under the degree of a knight. 1 Chitt. C. L., 204. The statute of additions, 1 Hen., 5. c. 5. enacts that defendants shall be described by adding to their names their estate, degree, or mystery, and place of residence, in all cases in which "the *exigent* shall be awarded." It has [*50] *been held, in the construction of this statute, that in prosecutions which can not be attended by the process of outlawry, the indictment need not give the *addition* of the defendant. 1 Chitt. C. L., 206; Bac. Abr. Indictment, 2. Ib. Misnomer, 2; *Rex v. Brough*, 1 Wils., 244; Cro. Eliz., 148. The *exigent*, being a step in the proceedings of outlawry, is unknown to our law.

It is, therefore, evident that the statute of additions, from its own terms, is not applicable to prosecutions in this State; and it is equally clear, that the common law does not require the defendant to be described by his *addition* in our indictments. The Circuit Court erred in quashing the indictment.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

J. Pitcher, for the defendant.

SANDERS v. JOHNSON.

PRACTICE—WITHDRAWING PLEAS.—The Circuit Court refused to permit the defendant to withdraw one of his pleas after some of the jurors were sworn, the withdrawing of which would have deprived the plaintiff of the right to open and close the cause to the jury. The Court said that, admitting they had a supervisory power over the discretion of the Court below in such case—a point not decided—they saw no reason for supposing that the discretion, in this case, had been improperly exercised.

SEPARATION OF WITNESSES.—At the time of swearing his witnesses, and

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before they were examined, the defendant moved the Court to remove such of the plaintiff's witnesses out of hearing as the latter held in reserve, which motion was overruled. *Held*, that the granting or refusing such motions is a matter of discretion, which did not appear to have been unsoundly exercised on this occasion.

SUPPRESSING DEPOSITION.—If a deposition be improperly suppressed, the party waives the error by introducing another deposition of the same witness, testifying to the same facts.

SLANDER—JUSTIFICATION—DAMAGES.—Slander for charging the plaintiff with perjury. Pleas, the statute of limitations and a justification that the words were true. *Semble*, that the general bad character of the plaintiff in such case may, even under a justification, be proved with a view to lessen the damages.^(a)

Held, that in such case, the existence of prior reports charging the plaintiff with the crime imputed to him by the defendant, without any offer [*51] to *explain their extent, or effect upon the character of the plaintiff, is not, under a plea of justification, legal evidence in mitigation of damages.

Held, also, that there may perhaps be cases in which the evidence—showing, not the truth of the justification pleaded, but that the defendant had reason, from the glaring misconduct of the plaintiff, to believe the charge and plea justifying it to be true—may be considered by the jury in mitigation of damages; but that the record before the Court did not show such a case.

Held, also, that this being a very aggravated case, the refusal to grant the defendant a new trial because the damages—\$2,736—found by the jury were excessive, was not error.

APPEAL from the *Monroe* Circuit Court.

DEWEY, J.—*Johnson* sued *Sanders* in slander for charging him with perjury. The defendant pleaded, 1, The general issue, which, after two continuances from term to term, he withdrew; 2, The statute of limitations, upon the traverse of which there was issue; 3, Three pleas of justification, alleging as many distinct instances of perjury against the plaintiff, committed on different occasions. *De injuria* replied to each of these pleas, and issues formed thereon. After a part of the jury was sworn, the defendant asked leave of the Court to withdraw the plea of the statute of limitations; leave was refused. When the trial commenced both parties claimed the right to begin with the testimony, and to make the opening

(a) See as to justification, 27 Ind., 527; 5 Id., 426; 7 Blackf., 83; 1 Ind., 92.

argument. The Court awarded it to the plaintiff. At the time of swearing his witnesses, and before they were examined, the defendant moved the Court to remove such witnesses as the plaintiff still held in reserve, so that they might not hear the defendant's witnesses. The motion was overruled. The Court suppressed one of the defendant's depositions, but another deposition, made by the same witness and containing the same matter as that rejected, was read to the jury by the defendant. The defendant offered to prove, in mitigation of damages, that the same charge laid in the declaration had been reported by others against the plaintiff before the defendant made it. The testimony was rejected. The defendant moved the Court to give several instructions to the jury, which, so far as they were pertinent to the issues, were given, with the exception of the following, viz.: "If the circumstances proved in the cause create a suspicion that the plaintiff committed perjury, but do not amount to proof of his guilt, the [*52] jury should consider them in mitigation of the damages." This charge the Court refused. The jury found a verdict for the plaintiff, and assessed his damages at \$2,736. A motion for a new trial was overruled, and final judgment rendered upon the verdict.

In regard to the motion for leave to withdraw the plea of the statute of limitations, admitting this Court to possess a supervisory power over the discretion of the Court below in permitting or refusing the withdrawal of a plea after issue—a point which we do not decide—we see no reason for supposing the discretion was improperly exercised on the present occasion. The defendant suffered the plea to stand at issue until the jury was partly sworn. The plaintiff, consequently, was compelled to keep his witnesses in attendance; and as this burden had been thrown upon him by the defendant, it would have been unreasonable to deprive him of the privilege, resulting from the issue as it then stood, of opening and closing the cause to the jury.

Courts, usually, on the application of either party, cause the witnesses to be separated, so that they can not hear each other

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testify. But this is a matter of discretion; and it does not seem to have been unsoundly exercised in refusing the request of the defendant in this instance, that a part of the plaintiff's witnesses only should withdraw. It would have been more reasonable had he included his own witnesses in his motion.

As to the suppression of one of the defendant's depositions, we have not inquired whether there was sufficient cause for it or not. Because, admitting it to have been improperly suppressed, the defendant waived the error by introducing another deposition, by the same witness, testifying to the same facts contained in that which was rejected. He sustained no injury by the decision of the Court, right or wrong.

The rejection of the evidence offered by the defendant of the existence of a prior report, imputing to the plaintiff the same crime with which the defendant afterwards charged him, raises a question of some difficulty.

In the case of *Leicester v. Walter*, 2 Campb., 251, which was an action for a libel in charging the plaintiff with having committed an infamous offense, the defendant was permitted to

give in evidence in mitigation of damages, under the [*53] *general issue, that previous to the publication of the

libel, "there was a *general* suspicion of the plaintiff's character and habits; that it was *generally* rumored that such a charge had been brought against him; and that his relations and former acquaintance had, on this ground, ceased to visit him." This evidence was admitted for the reason that the defendant had not justified, and because it established the character of the plaintiff to be "in as bad a situation before as after the libel." In the subsequent case of *Snowden v. Smith*, 1 M. & S., 287, n., in which there was a justification, it was ruled that prior reports, imputing the same crime to the plaintiff with which the defendant had charged him, should not go in evidence to affect the amount of damages. The judge who tried the cause distinguished it from *Leicester v. Walter* on the ground of the justification. In *Kirkham v. Oxley*, cited in 2 Stark. Ev., 217—an action of slander for accusing the plaintiff with larceny—evidence of his "bad character" was allowed in

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mitigation of damages, though the defendant had justified. This decision has been thought to conflict with that of *Snowden v. Smith*. But such does not seem to be the fact. There is a clear difference between a report imputing to a man the commission of a specific crime, and the badness of his character. The report may be unfounded, it may not gain credit, it may not injure the character of the individual to whom it refers; at least, it is substantially falsified by a verdict against the justification alleging the same crime. But a bad character might not, and if it be generally bad could not, be materially bettered by such a verdict. This consideration, together with the presumption that a man is always prepared to vindicate his general character, renders it probable that the general bad character of the plaintiff may, even under a justification, be given in evidence with a view to lessen the damages. We do not, however, decide that question.(1)

In an action of slander for charging the plaintiff with unnatural practices, decided still later than those above quoted, ——— v. *Moore*, 1 M. & S., 285, evidence of the existence of reports that the plaintiff had been guilty of "similar practices" was held to be admissible in diminution of the damages, on the ground that such evidence would "disparage the fame" of the plaintiff, and destroy his right "to the [*54] same *measure of damages with one whose character is unblemished." There does not appear to have been a justification in this case; and the "*similar practices*" could not allude to the specific slander laid in the declaration; they must have had reference to something else of like nature, and, therefore, must have had a bearing upon the character of the plaintiff independently of the wrong for which the action was brought. Indeed, this evidence fell but little, if any, short of that of general bad character. In the case of *Waitham v. Weaver et al.*, D. & R. N. P. C., 10, which was an action for a libel, *Abbot*, C. J., ruled that, under the general issue, evidence of facts short of a complete justification of the alleged libel could not be given in evidence to mitigate the damages, by negating the malice, though he recognized the authority of *Leicester v*

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Walter, on the ground that the rumors, permitted to be proved in that case, tended to show that the plaintiff had previously lost his character, and had sustained no injury by the libel. This Court has heretofore held that, under the general issue, the "strong suspicions" of the defendant, that the words spoken by him were true, could not be received to affect the verdict, though a general suspicion of the plaintiff's guilt might. *Henson v. Veatch*, 1 Blackf., 369.

None of these decisions go further than to establish the doctrine, that, under the general issue in slander, general rumors, or a general suspicion of the guilt of the plaintiff of the crime imputed to him by the defendant, may be given in evidence in mitigation of damages. They do not sustain the loose position assumed by the plaintiff in error, that *any* reports, however limited in circulation, or harmless in effect, which may have preceded the slander uttered by him, imputing the same crime, are competent evidence on the question of damages even under a justification. To admit such a principle would be to concede, that the very slander which ought to be silenced forever by the failure of the justification, may, nevertheless, become the rightful means of depriving the injured person, in a great measure, of the benefit of his action, and of leaving his character, at last, to the mercy of an artful slanderer. The case of *Snowden v. Smith*, *supra*, is in point, that the mere report is not admissible evidence when a justification is pleaded.

[*55] Several decisions in **Massachusetts* sustain the same doctrine; indeed, they go further, and exclude such evidence under the general issue; though they recognize the propriety of admitting the general bad character of the plaintiff either under that issue, or a plea justifying the slander. *Wolcott v. Hall*, 6 Mass., 514; *Alderman v. French*, 1 Pick., 1; *Bodwell v. Swan and wife*, 3 Pick., 376; *Larned v. Buffinton*, 3 Mass., 546. We, however, only decide that the existence of prior reports charging the plaintiff with the same crime imputed to him by the defendant, without any offer to explain their extent, or effect upon the character of the former, is not, under a plea of justification, legal evidence in mitigation

of damages. The Circuit Court committed no error in rejecting the evidence offered by the defendant.

The next inquiry is one, also, of some difficulty. It is this, should the jury have been instructed, that if the circumstances proved on the trial were such as to cause suspicion, but not conviction, that the plaintiff had committed perjury, they should be considered in the estimation of damages?

In the case of *Larned v. Buffinton*, *supra*, which was an action of slander for charging the plaintiff with horse stealing, pleas, general issue and justification, the Supreme Court of *Massachusetts* held, that under the circumstances of that case, nothing short of absolute proof of the truth of the words spoken should operate to lessen the amount of the verdict. There may, perhaps, as was remarked by the Court on that occasion, be instances in which, though the justification is not supported, the misconduct of the plaintiff may have been so glaring as to give the defendant reason to believe that the charge made by him, and his plea justifying it, are true; in which case, it may be proper for the jury to consider the circumstances developed on the trial in mitigation of the damages. We have, however, carefully examined the evidence in the cause before us, and do not think it presents an instance of the character alluded to. We see nothing in it, which rendered it the duty of the Circuit Court to give the instruction asked for.

Nor are we prepared to say there should have been a new trial on the ground of excessive damages. Courts seldom disturb verdicts on the score that compensation for an injury to character has been estimated by too high a standard.

[*56] *Taking into consideration the infamous nature of the crime charged upon the plaintiff, that the accusation was made publicly and repeatedly in large assemblages of the people when he was canvassing for an important office; that three distinct charges of perjury were deliberately made against him on the records of the Court; that with regard to one plea, there was no evidence at all, and very little in support of the other two; we do not feel authorized to pronounce the damages so palpably excessive as to defeat the verdict.

 Sherry and Others v. Foresman and Others.

Per Curiam.—The judgment is affirmed with one *per cent.* damages and costs.

C. P. Hester and *J. S. Watts*, for the appellant.

G. G. Dunn, for the appellee.

(1) In case for slander in charging the plaintiff with perjury, the pleas were not guilty and justification. *Held*, that the defendant might give in evidence, in mitigation of damages, the general bad character of the plaintiff for veracity when on oath. *McNutt v. Young*, 8 Leigh, 542. The contrary is decided by the *English Court of Exchequer*. It is there held that such evidence is inadmissible in mitigation of damages, even under the general issue. *Jones v Stevens*, 11 Price, 235.

SHERRY and Others v. FORESMAN and Others.

REPLEVIN-BOND—PLEADING.—Debt on a replevin-bond. Pleas, 1, *Non dam-nificatus*; 2, If the plaintiff was injured, it was by his own wrong; 3 and 4, The goods belonged to the principal obligor; 5, The principal obligor was ready and willing to prosecute his writ of replevin with effect, but the Court, at the instance of the plaintiff, dismissed the cause for want of jurisdiction, on the ground of defects apparent on the face of the affidavit and the writ; that no damages were recovered in the action of replevin, nor was a return of the property awarded; 6, The bond was executed without consideration. 7, The consideration of the bond was illegal; 8, No record of the replevin suit; 9, The same with the fifth. *Held*, that these pleas, except the eighth were insufficient.(a)

SAME—VARIANCE.—If a bond sued on be described in the declaration as joint and several, and the bond produced on *oyer* be joint only, the variance is fatal.

JUDGMENT ON DEMURRER.—If the plaintiff demur to a plea, and there be judgment against him because the declaration is bad, he may sue again for the same cause of action.(b)

[*57] *APPEAL from the *Tippecanoe Circuit Court*.

BLACKFORD, J.—The appellants sued the appellees in an action of debt on a replevin-bond.

The declaration states that *Foresman* made affidavit, that he

(a) *Sammons v. Newman*, 27 Ind., 508; 1 Ind., 144; Id., 190.

(b) *Estep v. Larsh*, 21 Ind., 190.

and another of the defendants, *Earl*, were the owners of the pork, hams, and lard, of a certain number of hogs, and that the same were unlawfully detained from them by the plaintiffs. The declaration also states that, on this affidavit, a writ of replevin was issued commanding the sheriff to take said property, and if *Foresman* and *Earl* should give security to prosecute, &c., then to replevy and deliver the property to them; that the sheriff took possession of the property, and thereupon took from the defendants a joint and several bond, conditioned that if *Foresman* and *Earl* should prosecute the writ of replevin to effect, &c., and duly return the property in case, &c., then the bond should be void; that thereupon the sheriff delivered the property so replevied to *Foresman* and *Earl*; that afterwards *Foresman* and *Earl* filed their declaration in the replevin-suit; and that their writ was dismissed for want of jurisdiction, on the ground of defects apparent on the face of the affidavit and the writ; that *Foresman* and *Earl* did not prosecute their writ with effect, or make return; that the sheriff afterwards assigned the bond to the plaintiffs; and that by means thereof an action has accrued, &c.

The defendants craved and obtained *oyer* of the bond and condition set out in the declaration. The bond, as shown on *oyer*, is not joint and several, but joint only.

The following pleas in bar were filed: 1, *Non damnificatus*. 2, If the plaintiffs have been injured, it was by their own wrong. 3, and 4, The goods were the property of *Foresman* and *Earl*. 5, *Foresman* and *Earl* were ready and willing, at, &c., to prosecute their writ of replevin with effect, but the Court, at the instance of the plaintiffs, dismissed the cause for want of jurisdiction, on the ground of defects apparent on the face of the affidavit and the writ; and no damages were recovered in the action of replevin, nor was a return of the property awarded. 6, The bond was executed without consideration. 7, The consideration of the bond was illegal. 8, No record of the replevin-suit. 9, This plea is substantially the same with the fifth plea.

*58] *Upon motion of the plaintiffs, the first, second,

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sixth, and seventh pleas were correctly rejected. Replication to the eighth plea, that there is such record.

General demurrers to the third, fourth, fifth, and ninth pleas. The demurrers were overruled, and judgment rendered for the defendants.

The only error assigned is, that the demurrers were improperly overruled.

The third and fourth pleas are bad. The object of these pleas is to furnish an excuse for the failure of the action of replevin, and thus bar the present suit. But the fact, that the property replevied belonged to *Foresman* and *Earl* can not be a bar to the breach assigned, viz., their failure in the suit which they had brought for the unlawful taking of the property. Whether, on the execution of a writ of inquiry, after a judgment for the plaintiffs by default or on demurrer, the defendants might prove the property to be theirs in mitigation of damages, is another question with which we have now no concern.

The fifth and ninth pleas are also insufficient. There is no doubt that if the Court in which the bond was taken had no jurisdiction of the subject matter, the bond would be void and the pleas on that ground good. But there is not the slightest reason for saying that the Court had no jurisdiction of the replevin-suit. It might just as well be contended that the Court had no jurisdiction in debt or assumpsit. It is contended that these pleas are valid, because they show that the replevin-suit was dismissed against the will of the plaintiffs in that suit; but such dismissal is no bar to the action. *Foresman* and *Earl* were bound to obtain a judgment in their favour in the replevin-suit, or be liable with their sureties to an action on the replevin-bond. *Brown v. Parker*, in this Court, May term, 1840; *Perreau v. Bevan*, 5 Barn. & Cress., 284. They have failed to obtain such judgment; and the failure—whether it was owing to defects in their affidavit and writ, or to the want of a good declaration, or to their not having sufficient evidence to obtain a verdict—is a breach of the condition of the bond. The cases of *Flagg v. Tyler*, 3 Mass. Rep., 303,

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and *Roman v. Stratton*, 2 Bibb, 199, show that the two pleas last named can not be supported.

[*59] *We are, therefore, of opinion that the pleas demurred to can not be sustained.

The demurrers to the pleas, however, require us to examine the declaration. We find there is a fatal variance between the bond described in the declaration and that shown on *oyer*. The declaration describes the bond to be joint and several; but the bond produced on *oyer* is not joint and several, but joint only. This variance renders the declaration bad on general demurrer, and shows that the judgment for the defendants must be affirmed. But as the judgment is to be considered as rendered against the plaintiffs on a demurrer to the declaration, it will be no bar to a subsequent suit on the replevin-bond. *Stevens v. Dunbar*, 1 Blackf., 56; *Gilman v. Rives*, 10 Peters, 298.

Per Curiam.—The judgment is affirmed.

J. Pettit, A. Ingram, Z. Baird, and J. L. Scott, for the appellants.

R. A. Lockwood and D. Mace, for the appellees.

 COMPARET and Another v. JOHNSON and Another.

PROMISSORY NOTE—BREACH OF WARRANTY.—In a suit by an assignee against the maker of a promissory note not governed by the law-merchant, the defendant may prove, under the general issue, a breach of warranty as to the quality of goods sold to him by the payee, for the price of which the note was given, in order to lessen the amount to be recovered.(a)

ERROR to the *Allen* Circuit Court. The judgment was in favour of the plaintiffs below who are the defendants in error.

DEWEY, J.—Debt by the assignees of a promissory note against the makers. Plea, the general issue. Trial by the Court, and judgment for the plaintiffs. On the trial, the defendants offered to prove that the note was given for the price

(a) *Doremus v. Bond*, 8 Blackf., 368.

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of certain liquors sold by the payee to the makers; that the seller warranted the liquors to be foreign liquors of good quality, when in truth they were domestic liquors of little or no value. The plaintiffs objecting, the evidence was rejected by the Court. This is the error assigned.

[*60] *The note in question not being payable and negotiable at a chartered bank in this State, the makers were entitled to the same defense against the indorsees to which they would have had a right, had the action been by the payee. The rejection of the evidence raises the question, whether the partial failure of the consideration of the note was admissible in evidence, under the general issue, for the purpose of lessening the amount to be recovered; or in other words, whether the injury sustained by the makers, in consequence of the breach of the warranty, could be set off against a part of the sum for which the note was given?

It is well settled law both in the *English* and *American* Courts that, in an action founded on a contract of sale for the stipulated price of the commodity sold, if there has been a violation of a warranty respecting the property, the injury sustained by such violation may be given in evidence in mitigation of damages, or in bar if the thing sold be of no value. This principle is founded upon the policy of avoiding a circuitry of action, as the rights of the parties can be as fully discussed and adjusted in an action for the price of the property, as if the purchaser were driven to a cross action on the warranty. It is true, that none of the *English* decisions has gone the length of suffering a partial failure of the consideration of a collateral contract, the consideration of which was the price of the subject matter of sale, to be given in evidence in mitigation of damages. But we see no solid distinction, in this respect, between an action founded on the original contract for the stipulated price of the article, and one founded on a collateral undertaking to pay that price. Certainly, circuitry of action will be as much avoided in the one case as in the other. In *New York* the distinction does not exist. And in a late case in *Massachusetts* the authorities on the subject were collected, and after a careful review of them,

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the Court held that a partial failure of the consideration of a collateral promise to pay the price of goods sold, might be given in evidence in mitigation of the damages. *Harrington v. Stratton*, 22 Pick., 510. This, we think, is the correct doctrine. The Circuit Court erred in rejecting the evidence offered by the defendants.(1)

[*61] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and *W. H. Coombs*, for the plaintiffs.

T. Johnson, for the defendants.

(1)Vide *Wynn et al. v. Hiday*, Vol. 2, of these Rep., 123, and note. *Tucker v. Tipton*, 4 Id., 529.

THE STATE, on the Relation of *DYER, v. OWENS* and Others,
in Error.

RECOGNIZANCE entered into before a justice of the peace of *Clay* county in a case of bastardy. The recognizance recited that *Isabel Dyer*, an unmarried woman of *Jackson* township in said county, in her examination on oath taken in writing before said justice, had declared that she was on, &c., delivered of a male bastard child, and that *William Owens* was the father of the child—and was conditioned for the reputed father's appearance, at the next term of the Circuit Court, to answer the accusation and abide the judgment of the Court. Held, that the recognizance was sufficient.

BURGER and Another v. BECKET, in Error

THIS case was decided in the Circuit Court on appeal from the judgment of a justice of the peace on a *scire facias* against bail for the stay of execution. Held, 1, That as the justice's

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transcript stated that a plea had been filed without showing what it was, it must be presumed to have been the statutory plea allowed in actions before justices of the peace requiring proof of the demand. 2, That the transcript of the judgment appealed from and the *scire facias* were no evidence of the truth of the matters alleged in the latter. 3, [*62] *That the constable's return to the execution against the original judgment debtor could not be controverted in this suit. *Hamilton v. Matlock*, Nov. term, 1840.

THE STATE v. CRUIKSHANK.

PERJURY—INDICTMENT.—An indictment for perjury charged the defendant with making an affidavit, that a certain boat was, as he believed, attempting to pass a certain place, &c., whereas he did not believe that the boat was attempting to pass said place, &c. *Held*, that the indictment was not objectionable for not alleging that the boat was not attempting to pass the place, &c.(a)

ERROR to the Knox Circuit Court.

BLACKFORD, J.—This was an indictment for perjury. The charge, so far as any question in this case is concerned, is as follows: That on, &c., at, &c., the defendant made an affidavit that a certain steamboat at the landing at *Vincennes*, laden in part with certain goods, &c., to be delivered at *Vincennes*, &c., of the value of \$9,000 as the defendant believed, was attempting to pass said place of delivery without delivering said freight; whereas, in truth and in fact, at, &c., the defendant did not believe that the said steamboat, then at the landing at *Vincennes*, &c., was attempting to pass said place of delivery without delivering said freight; and whereas the defendant, in truth and in fact, did not believe said freight was of the value of \$9,000. And so the jurors say, &c.

(a) *State v. Ellison*, 8 Blackf., 225.

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The Circuit Court, on the defendant's motion, quashed the indictment.

The indictment is objected to, because it does not allege that the boat was not attempting to pass the place of delivery; and, also because there is no averment that the goods were not worth \$9,000.

These objections are unfounded. To constitute perjury the oath must, of course, be false, but that may be the case whilst, at the same time, the matter sworn to is true. The law is, that what is sworn to must be either false in fact or, if true, the defendant must not have known it to be so.

*63] Lord *Coke* uses the following language on the subject: "Herein the law taketh a diversity between falsehood in express words, and that is only within this statute (5 *Eliz.*), and falsehood in knowledge or mind, which may be punished though the words be true. For example, damages were awarded to the plaintiff in the star-chamber according to the value of his goods riotously taken away by the defendant; the plaintiff caused two men to swear the value of his goods, that never saw nor knew them; and though that which they swore was true, yet because they knew it not, it was a false oath in them, for the which both the procurer and the witnesses were sentenced in the star-chamber." 3 Co. Inst., 166. The law is also so stated by the later writers on criminal law. 1 Hawk., ch. 69, sec. 6; 2 Chitt. C. L., 303; Arch. C. P., 538.

It follows, we think, that where a man swears that a thing is so, or that he believes it to be so, when, in truth, he does not believe it to be so, *the oath is false* though the fact really be as stated.

That being the law, there could be no occasion, in the case before us, for the indictment to aver that the boat was not attempting to pass the place of delivery, or that the goods described were not worth \$9,000.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

S. Judah, for the defendant.

Remington v. Henry.

REMINGTON v. HENRY.

REPLEVIN-BAIL—SCIRE FACIAS.—A *scire facias* against bail, which was issued by a justice of the peace in *April*, 1840, recited a judgment rendered by the justice against the original debtor in *November*, 1839, and alleged that the defendant, in *November*, 1840, entered himself as bail for the stay of execution on said judgment for 150 days, which period had long since elapsed, &c. *Held*, that the *sci. fa.* could not be objected to, on general demurrer, on account of the repugnant allegations as to the time of the entry of bail. *Held*, also, that a transcript of an entry of bail of a
 [*64] different date from the objectionable time *when the *sci. fa.* alleged the entry to have been made, could not be objected to as evidence on the ground of variance.

JUSTICES OF THE PEACE—JURISDICTION.—Though a note filed before a justice of the peace as a cause of action be, on its face, for a sum beyond his jurisdiction, yet if the amount actually demanded and recovered be within it, the presumption is, that the note had been so reduced by credits as to authorize the justice, under the statute, to take cognizance of the cause.

AUTHENTICATION OF TRANSCRIPT.—The transcripts of two judgments of a justice of the peace, written on the same sheet of paper, may be authenticated by one certificate of the justice, including in its terms both transcripts.

ENTRY OF BAIL.—Bail for the stay of execution of a judgment rendered by a justice of the peace, must be entered on his docket, and is a matter which may be proved by a transcript, at least when the entry is not denied on oath.

EVIDENCE.—If an instrument of writing be stated in pleading to have been made on such a day, without alleging when it was dated, an instrument dated on a different day from that stated may be given in evidence.

RETURN OF OFFICER.—In a *scire facias* against bail for the stay of execution, he is not permitted to show that the officer's return to the execution against the principal debtor is false.

ERROR to the *Fayette* Circuit Court. The plaintiff in error was the defendant in the Circuit Court.

DEWEY, J.—*Scire facias* against bail for the stay of execution issued by a justice of the peace. Judgment against the defendant by default before the justice. Appeal to the Circuit Court. Judgment for the plaintiff.

The *scire facias* was issued on the 27th of *April*, 1840. It recites a judgment rendered by the justice against the original debtor on the 14th of *November*, 1839, and alleges that the

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defendant, on the 14th of *November*, 1840, entered himself on the justice's docket as bail for the stay of execution on the judgment, interest, and costs, for 150 days, which period had, at the date of the *scire facias* "long since elapsed;" and that an execution had subsequently issued against the judgment-debtor, and been returned "no property." The defendant moved the Circuit Court to dismiss the suit for want of a sufficient cause of action. The motion was overruled. He then asked leave to file two special pleas upon the payment of costs, the substance of which was, that the original judgment-debtor had property sufficient to pay the judgment, while the execution so returned "no property found" was in the constable's hands, and that the property might have been taken on the execution. The plaintiff objecting, leave was refused.

[*65] The *plaintiff offered in evidence a transcript of the original judgment, and of the stay thereof by the defendant, dated the 30th of *November*, 1839. It appeared that the original judgment had been rendered by default, and that the cause of action on which it was rendered was a promissory note calling, on its face, for \$215, though the demand sued for, and for which judgment was obtained, was less than \$100. The transcript of this judgment preceded a transcript of the judgment on the *scire facias* on the same sheet of paper, and both were authenticated in one certificate of the justice, at the foot of the latter transcript; the evidence was objected to, but the objection was overruled. The defendant offered evidence of the same facts which were contained in the rejected pleas, but the Court excluded it.

The matters urged as errors are, 1, That the action was not dismissed; 2, The admission of the transcript of the original judgment; 3, The admission of the transcript of the entry of bail for the stay of execution; 4, The rejection of the special pleas, and of the corresponding evidence.

None of these objections can be sustained, though some of them are plausible.

First—The *scire facias* must be considered as a declaration. The cause of action which it alleges is, that the defendant

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entered himself, on the justice's docket, as bail for the stay of execution for a definite period which had elapsed, &c. It is true that the time, at which this transaction is alleged to have taken place, was impossible in point of fact, and repugnant to the rest of the allegation. But when an impossible or repugnant time is averred in pleading, it is considered as surplusage, at least on general demurrer, and the allegation is to be viewed as if no time at all had been stated. *Buckley v. Kenyon*, 10 East, 139. Seen in this light, the *scire facias* contains too much to authorize the dismissal of the suit for the want of a cause of action.

Second—The objections urged against the transcript of the original judgment as legal evidence are, that the judgment is a nullity, and that the transcript was not sufficiently authenticated. The first of these objections is founded on the supposition that the justice had no jurisdiction over the [*66] subject *matter which gave rise to the judgment, because the note which was filed as the cause of action in that case was, upon its face, for a sum over \$100. But as the amount actually demanded and recovered was under that sum and within the jurisdiction of the justice, the presumption is that the note had been reduced by credits. In which case, the justice was authorized to take cognizance of it. R. Stat., 1838, p. 364. As to the other objection, we find on examination that the certificate of the justice includes in its terms the transcript of the original judgment, as well as that of the judgment from which the appeal was taken; and this, we think, is a sufficient authentication of both.

Third—The plaintiff in error contends against the admissibility of the transcript of the entry of bail also upon two grounds. The first is, that the transcript being but a copy, was illegal evidence; and the other, that there was a variance between the entry of bail shown by the *scire facias*, and that shown by the transcript. In answer to the first objection, it is sufficient to refer to the statute which provides that copies of the proceedings of justices in this State, duly certified, shall be received in evidence. R. Stat., 1838, p. 274. Bail for the

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stay of execution of judgments rendered by those magistrates is required to be entered on their dockets, and is, we think, a matter within the statute to be proved by a transcript, at least when the entry of bail is not denied on oath. As to the variance, we have already seen that the impossible and repugnant time stated in the *scire facias*, at which the entry of bail was alleged to be made, is to be considered as surplusage, and the allegation to stand as if no time was averred. The entry of bail as shown by the transcript was on the 30th of November, 1839, which was before the issuing of the *scire facias*. Here is evidently no variance. Indeed, in the higher Courts, where more strictness in pleading is required than is necessary before justices of the peace, the time at which an instrument of writing is stated to be made is immaterial, provided no date is given to the instrument itself, and one bearing a date different from the alleged time of making it may be given in evidence. 1 Chitt. Pl., 258, 311; *Hall v. Cazenove*, 4 East, 477; *Coxon v. Lyon*, 2 Campb., 307, n.

[*67] **Fourth*—The special pleas which were rejected, and the evidence that was excluded, were correctly dealt with, because they were attempts to falsify, collaterally, the return of an authorized officer, which can not be done. *Hamilton v. Matlock*, November term, 1840. *Burger et al. v. Becket*, at this term.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

S. W. Parker, for the plaintiff.

C. H. Test, for the defendant.

CULBERTSON v. STANLEY.

SLANDER—VARIANCE.—If the words in slander are laid as having been spoken to the plaintiff, it is a variance if they were spoken concerning him to a third person.

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PLEADING—PRACTICE.—A plea professing to answer a part of the cause of action, and being an answer to such part, though not drawn with technical accuracy, ought not to be rejected on motion.

EXAMINATION OF WITNESS.—The overruling of an objection to a leading question, put by the plaintiff to one of his witnesses, can not be assigned for error, unless the record show that the defendant was injured by the answer of the witness. (a)

APPEAL from the *De Kalb* Circuit Court.

SULLIVAN, J.—This was an action of slander by *Stanley* against *Culbertson*. The declaration contains three counts. The first and second charge, that the defendant spoke and published of, and concerning the plaintiff the following words, viz.: “You stole a hog and I can prove it.” “You killed a negro and I will have you up for it.” The third count is for speaking the words, “You killed a negro and I will have you up for it.”

The defendant pleaded three pleas; 1, Not guilty. 2, The statute of limitations. 3, Justification as to the following words in the first and second counts, “You stole a hog,” &c.

On the motion of the plaintiff, the Court rejected the third plea. Issues were made on the first and second. Verdict *for the plaintiff; motion for a new trial overruled; and judgment on the verdict.

On the trial, the plaintiff introduced witnesses to prove certain words spoken of him by the defendant to third persons, in his absence. The defendant objected, but the Court admitted the testimony. A charge of words spoken in the second person, is not supported by proof of words spoken in the third person. 2 Stark. Ev., 453. The Court, therefore, should have rejected the testimony.

The rejection of the third plea was also erroneous. The plea professed to answer a part only of the plaintiff's cause of action, and that part it answered fully. It was not drawn with technical accuracy, yet it was not a nullity. It did not come within the rule which authorizes the rejection of a plea on motion. Gould on Pl., 350.

(a) *City of Aurora v. West*, 22 Id., 88; *Rodman v. Kelly*, 13 Ind., 377

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It further appears that, on the trial, a question evidently leading in its nature, was put by the plaintiff to one of his witnesses. The defendant objected to the witness answering the question, but the Court overruled the objection. In that the Court erred; but as the record does not contain the answer of the witness, nor inform us whether he answered the question at all or not, we do not know whether the defendant was injured by it or not. If the witness did not give the answer which it was the design of the plaintiff to draw from him, the defendant has no reason to complain.

For the errors above mentioned, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Howe, for the appellant.

D. H. Colerick and *W. H. Coombs*, for the appellee.

[*69] *HAY and Others v. McCoy, in Error.

A COUNT in a declaration in debt commenced as follows: *Andrew P. Hay* and others (naming them), being a body corporate and politic, known by the name of the board of trustees of the *Clark county* seminary, and being the regular successors in office of *John C. Parker* and others (naming them), were summoned to answer, &c. It then stated that the last named persons, *Parker* and others, being the board of trustees, &c., by an agreement sealed with the seals of the trustees last mentioned, promised, &c., that neither they, nor the defendants being their successors, had paid, &c.

Held, that this count was insufficient; that the addition to the defendants' names of the words "being a body corporate, &c.," was a mere *descriptio personarum*; that the defendants must be considered, under this count, as being sued in their individual capacities, on a contract to which they were not

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parties, and by which they were not bound. *Held*, also, that if, as the plaintiff contended, the agreement sued on was binding on the board of trustees of the *Clark* county seminary as a corporation, the suit should have been brought against the corporation by its corporate name.

Debt for \$127. Two counts; the first showing no cause of action, and the second claiming only \$27.00. *Held*, that a judgment in favour of the plaintiff for the amount claimed by both counts was erroneous.

BROWN and Others v. ROSE and Others.

DECEDENTS' ESTATES—PAYMENT OF DEBTS.—Petition filed in the Probate Court against heirs, &c., under the statute, to have execution against the land of an intestate, on a judgment obtained against his administrators. Plea, that the administrators had assets sufficient to pay the debt, consisting of notes payable to them, obtained in part from the sale of the personal property of the deceased, and in part for real estate sold by them under an order of Court, on a credit not then expired. *Held*, that the plea was good.

SUBJECTING LAND TO PAYMENT OF DEBTS.—When any portion of
 [*70] the land of a deceased debtor, has been sold and converted into assets by his executor or administrator for the payment of debts, under an order of Court, no other land of the estate can be ordered to be sold on the application of creditors, until the assets so obtained as aforesaid have been exhausted.

APPEAL from the *Vigo* Probate Court.

SULLIVAN, J.—*Chauncey Rose* and others filed a petition, according to the provisions of the 24th section of the execution law (Rev. Stat., 1838, p. 284), against the administrators, heirs, and legal representatives of *Elisha U. Brown*, deceased, praying for the proper writ of execution against the real estate of said *Brown*, on a judgment obtained in the same Court by the petitioners against the administrators of the deceased. The petition contains all the averments required by the statute.

The defendants, by their plea, admit the judgment, execution, and return of *nulla bona*, as stated in the petition, but

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say that the petitioners ought not to have execution against the real estate of the decedent, because they say that there are assets sufficient in the hands of the administrators unadministered, to pay said debt, &c., consisting of notes payable to said administrators, obtained in part for the personal property of the said decedent by them sold in due course of administration, and in part for real estate sold by them according to law, and by virtue of an order of the Probate Court of *Vigo* county, which said last mentioned sales were made on a credit not yet expired; and that the amount when collected will be sufficient, &c.

The plea was demurred to and decided by the Court to be insufficient. Judgment for the petitioners.

The act under which the proceedings in this case were had, must be construed in connection with the 29th section of the act organizing Probate Courts, &c., Rev. Stat., 1838, p. 182. By the latter act it is provided, that so soon as any executor or administrator discovers that the personal estate of the decedent whom he represents, is insufficient to pay the debts and demands against said estate, he shall cause an inventory of the real estate of such decedent to be taken and filed in the Probate Court, and obtain an order of Court for the sale of so much thereof as may be necessary to discharge

[*71] *said debts and demands. Upon the sale of the real estate, the proceeds are assets in the hands of the executor or administrator for the payment of the debts. The application, in cases like the present, is made for the benefit of the creditors, and the proceeds of the sales come into the hands of the executor or administrator as their trustee. If the executor or administrator fails or refuses to convert the real estate into assets for the payment of the debts, according to the provisions of the last named statute, the creditor is not thereby prevented from subjecting the real estate to the payment of his debt. Amongst other remedies is the one given by the statute, by virtue of which the proceedings in this case were instituted. But when any portion of the land of a decedent has been converted into assets, on the application of an executor or admin-

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istrator, we think the fair construction of the statute is, that no other land can be sold until the assets which have come to his hands shall be exhausted. The creditor must look to the executor or administrator for a faithful application of the proceeds of the land sold. The Legislature did not intend to authorize the executor or administrator to sell a portion of the land of a decedent for the payment of his debts, and, at the same time, permit the creditors to sell the residue on execution for the payment of the same debts.

The plea before us avers, that there are assets in the hands of the administrators, sufficient to pay the debts of the decedent, arising in part from land sold by them pursuant to an order of the Probate Court; and that, therefore, the petitioners ought not to have execution against the remaining land. The averments in the plea are sufficient to bar the plaintiff's application, and the demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Kinney and S. B. Gookins, for the appellants.

C. W. Barbour and W. P. Bryant, for the appellees.

 [*72] *PARRY and Another v. HENDERSON.

PROMISSORY NOTE—PLEADING.—A promissory note was filed in debt as the cause of action, and the general issue pleaded without oath. *Held*, that the execution of the note was admitted.^(a)

ERROR to the *Allen* Circuit Court.

DEWEY, J.—*Henderson* sued *Isaac Parry* and *Charles E. Sturgis*, before a justice of the peace, in debt on a promissory note executed by *Isaac Parry & Co.* The cause was appealed to the Circuit Court, where the defendants pleaded the general issue without oath. On the trial the plaintiff produced the note. The defendants objected to its admission in evidence.

^(a) *Hauser v. Hays*, 11 Ind., 368.

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The Court overruled the objection, and without other evidence than the note, rendered judgment for the plaintiff.

It is contended that the judgment is erroneous, because there was no evidence that the defendants executed the note. This objection must fail. It has heretofore been decided, that the effect of the general issue, in debt or assumpsit, without oath, is to admit the execution of the instrument declared on. *Bates et al. v. Hunt*, 1 Blackf., 67. The plea in this cause was directly to the note itself, that being filed as the cause of action, and must have the same effect as if the note had been set forth in a declaration as made by the defendants. The plea admitted its execution by the defendants.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

T. Johnson, for the plaintiffs.

D. H. Colerick and *W. H. Coombs*, for the defendant.

ELDRIDGE and Another v. YANTES.

DELIVERY BOND CONSTRUED.—A bond conditioned for the delivery of goods taken on execution was in the usual form, except that it did not state to whom the property was to be delivered. *Held*, that the legal effect of the condition of the bond, that the property should be delivered at the time and place specified, was that it should then and there be delivered to the sheriff. *Held*, also, that a declaration in a suit on such bond, setting out the condition, &c., should aver that the property had not been delivered to the sheriff.

ERROR to the *Cass* Circuit Court.

DEWEY, J.—Debt on a delivery-bond. The declaration recites the recovery of a judgment by *Yantes* against *Eldridge*, the issuing of a *fi. fa.* upon it, the delivery of the execution to one *Horney*, sheriff of *Cass* county, the seizure of certain property belonging to *Eldridge* by virtue of the execution, the release of the property upon the giving of the delivery-bond, and the return of the bond to the clerk's office whence the

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execution issued. It then sets out the bond executed by *Eldridge and Cummings* to *Yantes* in the penalty of \$800, conditioned, after reciting the execution, and the seizure of the property thereon by *Horney*, the sheriff, for the purpose of being sold, "that should the said *Eldridge and Cummings* deliver, or cause to be delivered, the aforesaid property, in as good condition as it is now in, in front of said *Eldridge's* three-story brick store in the town of *Logansport*, on or before the 17th of *May*, 1839, then, &c." The breach assigned is, "that the said *Eldridge and Cummings* did not, nor did either of them, deliver or cause to be delivered the aforesaid property, or any part of it," at the time and place specified, or at any other time. The defendants craved *oyer* of the bond and condition, and demurred generally. The condition of the bond corresponded with its description in the declaration. The Court overruled the demurrer, and rendered final judgment for the plaintiff on the verdict of a jury of inquiry.

It is contended by the plaintiffs in error that the bond is a nullity, because its condition is not such as the statute regulating delivery bonds requires.

That statute enacts, that the officer seizing property on execution may release the same, upon a bond being given "conditioned for the delivery of such property, at a time and place named in such condition, to such officer to be sold according to law." R. Stat., 1838, p. 279. The bond before us is certainly very loosely drawn. The condition does not name any one to whom the property was to be delivered. We

do not, however, feel disposed to pronounce it a nullity [*74] *on account of this vagueness. Courts will give effect and meaning to contracts if possible, rather than declare them null and void for the want of certainty and clearness of expression. We learn from the condition of the bond that the property had been seized by *Horney*, the sheriff, for the purpose of being sold on an execution in favour of *Yantes* against *Eldridge*. The occasion and object of the bond are manifest. Its purpose was to secure the delivery of the property to be sold on the execution, or to give the judgment-

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creditor a remedy in case of a failure. The officer who made the seizure, and who held the execution, was, by the evident propriety of the case as well as by the statute, contemplated as the person to whom the property was to be delivered. The legal effect of the condition of the bond, that the property should be delivered at the time and place specified, is that it should then and there be delivered to the sheriff; and the condition might have been so treated in the declaration. But the bond and condition, being set out in *hæc verba* by the *oyer*, became a part of the declaration, and the Court will give them their proper construction. *Hysinger v. Colman*, May term, 1841. The declaration is, however, still defective. The breach of the condition is too generally assigned; it does not designate any person to whom the property was not delivered; it should have averred that it was not delivered to the sheriff. The Circuit Court erred in overruling the demurrer.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. W. Ewing and *R. Brackenridge*, for the plaintiffs.

C. Fletcher, *O. Butler*, and *S. Yandes*, for the defendant.

STEWART and Another, Administrators, v. CANTRALL.

DECEDENT'S ESTATES—PROVING CLAIMS.—Administrators can not be required, against their consent, to appear in the Probate Court, and plead to a mere account filed by a creditor of the estate.

[75] *SAME.—In a suit for an account, where there are issues of law and fact, a final judgment for the plaintiff for the amount of his claim without a jury of inquiry and without evidence, is erroneous.

APPEAL from the Warren Probate Court.

DEWEY, J.—*Cantrall* filed in the office of the clerk of the Probate Court of Warren county, during a session, an account against the administrators of *Stewart*, claiming a balance due him by the intestate of \$532. He, at the same time, moved the Court that a "notice" issue to the administrators, inform-

Stewart and Another, Administrators, v. Cantrall.

ing them that the claim was filed, and requiring them to show cause, in two days, why the same should not be allowed, or docketed for trial at the next term of the Court, and further giving them to understand, that if they failed to appear the claim would be considered in their absence. The motion was allowed, and the notice issued directed to the sheriff, but it was served by *Cantrall* himself on one of the administrators, and returned "not found" as to the other. The administrator, on whom service had been made, was defaulted, and the cause ordered to stand for trial at the next term of the Court. At that term, the administrator moved the Court to dismiss the proceedings. The motion was overruled, and they were required to plead; whereupon they filed several pleas, which, at a subsequent term, led to issues of fact and of law. The Court, upon finding the issues of law for the claimant, rendered judgment in his favour for the amount of his claim, without making any disposition of the issues of fact, without a jury of inquiry, and without evidence.

These proceedings, except the filing of the claim in the clerk's office, are all wrong. There is nothing in the statute organizing Probate Courts, and defining the powers and duties of executors and administrators, &c., which requires the personal representative of a deceased person, against his consent, to appear and plead to a mere account, or statement of the demand of a creditor of the estate, filed in the clerk's office or in the Probate Court. There is, indeed, a provision in that statute pointing out the manner in which a creditor shall file a statement of his demand in the clerk's office, and give notice thereof, for the purpose of securing a priority over other claims of less dignity, or of insuring its final payment. R. [*76] Stat., 1838, p. 182. But the law does not *contemplate that a claim thus filed, shall stand for a declaration to which the administrator or executor shall be compelled to plead, or, on failure to do so, be liable to have a judgment rendered against him by default. We do not mean to say, that if the parties consent to consider such a statement as a cause of action sufficiently set out, they may not do so, and proceed

Steepleton v. McNeely.

to a valid trial and final judgment. But, in the matter before us, there was no consent on the part of the administrators. And if there had been, the judgment rendered against them would still be erroneous, because it was rendered over the issues of fact, without a jury of inquiry, and without evidence.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Chandler, for the appellants.

R. C. Gregory, for the appellee.

THE STATE v. EMSHWILLER, in Error.

THE statute of 1836 does not require a person to give to the assessor of taxes a list of his personal property subject to taxation, but only the aggregate value of the same.

STEEPLETON v. MCNEELY.

JURISDICTION OF JUSTICE.—A constable may sue in a justice's Court, by notice and motion, for the price of goods sold by him on execution with ten *per cent.* damages, if the demand do not exceed \$100.

APPEAL from the *Harrison* Circuit Court.

BLACKFORD, J.—*Steepleton*, as a constable, commenced this action by notice and motion before a justice of the peace. The statement of demand alleges that the plaintiff, as constable, sold certain personal property, on an execution, [*77] to *the defendant for the sum of \$90; that the defendant refused to pay the purchase-money, and was therefore liable to the plaintiff for that sum with ten *per cent.* damages. There is a special plea which it is not necessary to examine. Judgment by the justice for \$99 and costs.

Earl v. Hamilton, in Error.

The Circuit Court, to which the defendant appealed, dismissed the suit on the ground that the justice had no jurisdiction of the cause.

The statute under which this suit was instituted authorizes the officer, in cases like this, to recover of the purchaser, by notice and motion, the purchase-money with ten *per cent.* damages, in any Court of competent jurisdiction; that is, in any Court having jurisdiction of the subject-matter. Rev Stat., 1838, p. 286. The jurisdiction of a justice of the peace extends to the amount of \$100 in actions of debt and assumpsit; and it follows, that if the sum now sued for could be recovered in either of those actions, the subject-matter is within a justice's jurisdiction.

According to the statement of demand, there is due from the defendant to the plaintiff the sum of \$99, arising out of simple contract, which shows that the amount sued for is recoverable in debt or assumpsit. The consequence is, that the subject-matter of the present suit is within a justice's jurisdiction, and that the suit was improperly dismissed. See *Cowgill v. Wooden*, 2 Blackf., 332.

Per Curiam.—The judgment of dismissal is reversed with costs. Cause remanded, &c.

J. W. Payne, for the appellant.

W. A. Porter, for the appellee.

EARL v. HAMILTON, in Error.

COUNTS in trespass *de bonis asportatis* and in trover may be joined, under the statute, in suits commenced before justices of the peace. *Aliter*, in suits in the Circuit Court.

Thomas, Assignee, v. Page and Another.

[*78] *THOMAS, Assignee, v. PAGE and Another.

CONCURRENT CONTRACTS.—Debt on a promissory note in the usual form by an assignee against the maker. Plea in bar of the action, that the note was given in consideration of two accepted bills of exchange, one of which was not due when the suit was brought; that, when the note was given, the payee agreed in writing with the defendant not to demand payment of it until the bills were paid, &c.; that the bills had not been paid, &c., and the consideration of the note had therefore failed.

Held, that the plea did not show a failure of consideration; it not appearing but that the defendant still held the bills, &c., and that the one not due would be paid at maturity. *Held*, also, that the note, and the written agreement described in the plea, formed one contract, according to which the time for demanding payment of the note had not arrived when the suit was commenced; and that the plea, therefore, amounted to the general issue.

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was an action of debt on a promissory note in the usual form, executed by the defendants for the sum of \$2,316.33, dated the 29th of *December*, 1838, and payable to *Stivers*, the plaintiff's assignor, twelve months after date. The declaration was filed the 17th of *September*, 1840.

The defendants pleaded in bar of the action, that the consideration of the note was the purchase by the defendants from *Stivers* of two bills of exchange for the sum of \$2,316.33 each, both dated the 5th of *October*, 1838, one payable twelve months after date, and the other twenty-four months after date, which bills were drawn on and accepted by one *Lewis Evans*; that at the time and place of making the note, the payee agreed with the defendants in writing, that the note was given in part consideration of said bills of exchange, and that the note should not be binding on the defendants, nor should any demand be made on them for the money, until the said acceptances of *Evans* should be all paid in cash by the acceptor or some person for him, and the same be produced with the note; that *Evans* had not paid the bills of exchange nor either of them, nor were the bills produced as evidence of their payment; and that, therefore, the consideration of the note had failed.

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[*79] *Special demurrer to the plea. The cause of demurrer assigned is, that it amounts to the general issue.

Judgment on demurrer for the defendants.

The plea shows that the note was given in consideration of two bills of exchange accepted by *Evans*, but that payment of the note was not to be demanded unless the bills should be paid when they became due. It is not shown by the plea, but that the defendants or their indorsees still held both the bills, and would enforce the payment of them against the acceptor. Besides, it is not shown but that the bill not due when the plea was filed, would be paid at maturity. The conclusion of the plea, therefore, that the consideration of the note had failed, is not warranted by the facts pleaded. The plea would have been valid as a plea of failure of consideration, had it shown that, on the acceptor's default as to the first bill, both the bills had been returned to *Stivers* and the contract rescinded. It would then have appeared—which was essential to the plea as a plea of failure of consideration—that the plaintiff held the note, at the time the suit was brought, without any consideration. But nothing of that kind is shown by the plea.

There are facts, however, stated by the plea, which, under the general issue, would be a bar to the suit. It shows that at the time the note was executed, *Stivers* entered into a written agreement that payment of the note should not be demanded, unless the bills of exchange should be both paid at maturity. The note and agreement must, under the circumstances, be considered as forming one contract. *Hunt v. Livermore*, 5 Pick. R., 395; *Cunningham v. Gwinn*, 4 Blackf., 341. At the time the suit was commenced, one of the bills, according to the plea, was not due and had not been paid. By the contract of the parties, therefore, even had the bill first due been paid, the time for demanding payment of the note had not arrived when the suit was commenced, the other bill not being yet due. That being the case, the plea amounts to the general issue, as it avers the contract to be a very different one from that described in the declaration. *Hayselden v. Staff*, 5 Adol. & Ellis, 153; 1 Chitt. Precedents, 204, m.(1)

Vance and Others v. The State, on the Relation of Goodlander, Treasurer, &c.

The demurrer to the plea should have been sustained.

[*80] **Per Curiam*.—The judgment is reversed with costs.

Cause remanded, &c.

J. G. Marshall and C. Cushing, for the plaintiff.

S. C. Stevens, for the defendants.

(1)“It is now settled that the defense, that by the original contract the defendant was to have *credit* or time for payment of the debt claimed, for a period which had not elapsed when the action was commenced, may be given in evidence under *non assumpsit* or *nunquam indebitatus*; and indeed *can not* properly be pleaded specially, as it shows a different contract from that declared upon, viz., to pay on request; and denies a present debt.” 1 Chitt. Prec., 204, m, and the authorities there cited.

What, in correct language, may be said to amount to the general issue is, that for some reason specially stated, the contract does not exist in the form in which it is alleged, and, where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rule of pleading, is not allowed. *Per Denman*, C. J. in *Hayselden v. Staff*, cited in the text.

CODDING v. DEAL, in Error.

A *SCIRE FACIAS* to have execution against real estate on a judgment of a justice of the peace, must show that a transcript not only of the judgment, but of the proceedings upon the judgment, had been filed in the Circuit Court.

VANCE and Others v. THE STATE, on the Relation of GOODLANDER, Treasurer, &c.

OFFICIAL BOND—PLEADING—PRACTICE.—Debt on a bond shown on *oyer* to be conditioned for the collection of taxes. Plea of performance, and replication assigning breaches. Special demurrer to the replication for being double and argumentative, and for not showing a sufficient assessment roll and precept.

Held, that the assignment of several breaches did not render the replication

Vance and Others v. The State, on the Relation of Goodlander, Treasurer, &c.

double; that a demurrer to it for being argumentative should show how it was argumentative; and that a legal duplicate of the assessment roll and a good precept were shown.^(a)

[*81] *Held, also, that the filing of a replication assigning breaches in such case, does not entitle the defendant to a continuance.

ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—This was an action of debt on a collector's bond. The defendants craved *oyer* of the bond and condition, and pleaded performance. The plaintiff replied denying the performance, and, after averring a delivery of a duplicate of the assessment roll, precept, &c., to the collector, assigned the following breaches, viz.: 1, That *Dickey*, the collector, by virtue of said precept, &c., had collected a large amount of the taxes due to said county, to wit, the sum of \$3,000, and had wholly failed and refused to pay the same to the treasurer as required by law. 2, That said *Dickey*, wilfully and negligently, failed to collect of the taxes due to said county, according to law, a large sum of money, to wit, the sum of \$2,000. 3, That he failed to return the duplicate and precept according to law.

To the replication, the defendants demurred specially, 1, Because it was double. 2, Because it was argumentative. 3, Because it did not set forth a legal assessment roll. 4, Because it did not show a sufficient precept. Joinder in demurrer, and judgment for the plaintiff.

The replication is not double. In actions on bonds like the one contained in this record, the statute authorizes the plaintiff to assign as many breaches as he may think proper; and, as this Court has repeatedly decided, the assignment of the breaches may be made in the declaration, or in the replication, at the option of the pleader.

The replication is not argumentative, and if it were, the demurrer should have shown specifically wherein and how it is argumentative. 1 Chitt. Pl., 573; *Spencer v. Southwick*, 9 Johns. R., 314; 1 Saund., 337, note 3.

The third and fourth causes of demurrer we think do not

(a) *Jarrell v. Snyder*, 7 Blackr 551

Clark, Assignee, v. Walker.

exist. The replication shows sufficiently, that a duplicate of the assessment roll made out according to law, and a precept in due form, were delivered to the collector.

Another alleged error relied upon by the plaintiffs in this Court for the reversal of the judgment, is the refusal of the Circuit Court to continue the cause on their application, on the filing of the replication by the plaintiff below. It is [*82] *contended, that the defendants in that Court were not apprized of what the plaintiff intended to rely upon until the breaches were spread upon the record, and that therefore they should not have been forced into trial at that term. This position is not tenable. The practice act provides that when a cause is called, if the plea or pleas have not been filed, the defendant shall plead, the plaintiff reply, and the defendant rejoin, and so on, until the issues in law or fact be made up, and a trial shall thereupon be had, &c. In the process of pleading, an issue may be formed not anticipated by the parties, yet the statute directs that the trial shall proceed. This, however, must not be understood as preventing a continuance on good cause shown by affidavit. The assignment of breaches in the replication is not an amendment of the declaration, which alone entitles the defendant to a continuance as a matter of course.

Per Curiam.—The judgment is affirmed, with 3 *per cent.* damages and costs.

C. H. Test, for the plaintiffs.

S. W. Parker, J. S. Newman, and *C. B. Smith*, for the defendant.

CLARK, Assignee v. WALKER.

PROMISSORY NOTE—FILLING BLANK INDORSEMENT.—A plaintiff suing on a sealed or promissory note as indorsee, may, after a plea of non-assignment, or even at the trial, fill up a blank indorsement; indeed, it is immaterial whether the indorsement be filled up at all or not. (a)

(a) *Moore v. Pendleton*, 16 Ind., 481; *Ferry v. Jones*, 10 Id., 226.

Stanton v. The State, on the Relation of Prather, Overseer, &c.

APPEAL from the *Vanderburgh* Circuit Court.

DEWEY, J.—This was an action of debt by *Clark* against *Walker* on three sealed notes for the payment of money. The declaration alleges that the notes were made by *Walker*, and were payable to one *Dobyns*, who by indorsement assigned them to *Clark*. Among several pleas, which led to issues of fact, *Walker* pleaded non-assignment of the notes under oath. On the trial of the cause, the plaintiff produced the notes described in the declaration, on each of which there was a special [*83] assignment from *Dobyns* to the plaintiff. It *having been admitted by the parties that the indorsements were originally in blank, and had been filled up after the filing of the plea, and before the replication thereto was put in, the Court, on the objection of the defendant, excluded the notes and assignments from being given in evidence.

This decision can not be sustained. It was competent to the assignee of the notes to fill up the blank indorsements on the trial. *Chitt. on Bills*, 149. Indeed, it was immaterial whether they were filled up at all or not. We have heretofore decided that a blank indorsement is sufficient, *prima facie*, to enable the holder of negotiable paper to maintain an action upon it. *Bowers v. Trevor*, 5 Blackf., 24.

The circumstance that the notes were sealed makes no difference. Such instruments are assignable by indorsement by the statute.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Brackenridge, for the appellant.

STANTON v. THE STATE, on the Relation of PRATHER, Overseer, &c.

OVERSEERS OF THE POOR, POWERS OF.—The children of living parents can not be interfered with by the overseers of the poor, or the Probate Court, unless their parents be found unable to maintain them.

Stanton v. The State, on the Relation of Prather, Overseer, &c.

ERROR to the *Hendricks* Probate Court.

DEWEY, J.—*Prather*, overseer of the poor of *Liberty* township in the county of *Hendricks*, filed a complaint before the Probate Court of that county, setting forth that *Stanton*, disregarding his duty as a parent, “wickedly” neglected, for an unreasonable period of time, to provide for his infant children, who were actually in a suffering condition for the want of the necessities of life; that *Prather*, in his official capacity, had demanded of *Stanton* his minor children for the purpose of binding them out as apprentices, to the end that they might be provided for, and trained to habits of industry.

[*84] *Stanton* pleaded not guilty; whereupon, a jury *being waived, the Court heard the testimony, and found him guilty of the charge alleged against him, and ordered that the overseer of the poor “take and bind out as apprentices, according to the poor laws,” all the infant children of *Stanton* that could be found in his township. There was also judgment against *Stanton* for costs. It appears by a report of the overseer that he did bind out three of the minor children as apprentices.

The law authorizes overseers of the poor “to put out as apprentices all poor children whose parents are dead, or whose parents shall be found by the overseers unable to maintain them,” provided the parents, residing in the county where the proceedings are had, do not object; but if they do object, they are to be summoned before the Probate Court to show cause why their minor children should not be bound out; and if they fail to show sufficient cause to the contrary, the Court shall order the overseers to bind out the children in the manner prescribed by law. R. Stat., 1838, p. 431, 432, 438.

These provisions do not authorize the proceedings which were had before the Probate Court in this cause. Overseers of the poor have no right to meddle with the children of living parents, unless they be found *unable* to maintain them. When such is the fact, and the parent objects to his child being apprenticed, the Probate Court has a right to act. In the complaint exhibited against *Stanton*, there is no allegation that

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he was not perfectly *able* to support his family. The charge is that he criminally *neglected* the wants of his children, and that they thereby became sufferers. Of this charge he was found guilty, and of none other. However reprehensible his conduct may have been, he did not, by mere neglect to perform his duty in providing for his family, subject the disposal of his children to the jurisdiction of the overseer of the poor, nor to that of the Probate Court. The law points out another mode of proceeding against those who neglect the wants of their families.

Per Curiam.—The judgment is reversed at the costs of the relator. Cause remanded, &c.

C. C. Nave for the plaintiff.

[*85] *McFARLAN v. MCJINSEY, in Error.

A *CAPIAS ad respondendum* was the proper process in suits in a justice's Court, under the statute of 1838, when the defendant was not a resident and householder in the county. And the justice could issue such writ in case of the defendant's non residence, without an affidavit of that fact being filed.

When such writ was issued by a justice, it was presumed to have been correctly issued until the contrary was shown.(1)

Appeal to the Circuit Court from the judgment of a justice of the peace in trover. There were, among the papers, two declarations for the conversion of the same property, each laying the damages at \$50.00. *Held*, that to show that the suit was only for \$50.00, and therefore within the justice's jurisdiction, the plaintiff might prove, by parol, that one of the declarations was filed in the Circuit Court only as an amendment of the other.

(1)Imprisonment for debt is now abolished in this State except in cases of fraud, &c. Stat., 1842, p. 68.

Robinoe v. Doe, on the Demise of Colwell and Others.

ROBINOE v. DOE, on the Demise of COLWELL and Others.

POSSESSION—EVIDENCE OF TITLE.—Possession of real estate is *prima facie* evidence of title, and must succeed until evidence of prior possession or higher evidence of title be produced.

SAME.—The possession of such property by an ancestor raises a presumption that he was seised in fee, and is sufficient, *prima facie*, to support an ejectment on the demise of his heirs.

EJECTMENT.—A joint demise by several heirs of real estate is sufficient to support ejectment.

ASSESSMENT ROLL, EVIDENCE.—A duplicate of an assessment roll of taxable property was not admissible as evidence under the statute of 1817, unless verified by the certificate of the clerk of the Circuit Court.

NEW TRIAL.—A party asking for a new trial on account of the discovery, since the trial, of a will material, &c., must show that, before the trial, the will had been searched for in the probate office.

APPEAL from the *Knox* Circuit Court.

DEWEY, J.—This was an action of ejectment on the [*86] joint *demise of several persons for a lot of land in Vincennes. Verdict and judgment for the plaintiff. The plaintiff proved that *Ambrose Mallet*, deceased, was in possession of the premises in dispute “upwards of twenty years before the commencement of this suit, and within twenty years, under a claim of title,” and that the plaintiff’s lessors were his heirs at law. The consent rule admitted the possession of the defendant at the time of the institution of the action. Here the plaintiff rested his cause. The defendant moved the Court to direct a nonsuit. The motion was overruled. This is one of the errors assigned.(1)

It is contended that a nonsuit should have been directed on two grounds; first, that the possession of the ancestor of the plaintiff’s lessors, under a claim of title, was not sufficient evidence of title in his heirs to enable them to sustain the action; and, secondly, that the action could not be supported on the joint demise laid in the declaration.

Neither of these objections can prevail. Possession is *prima facie* evidence of title, and must succeed until evidence of prior possession, or higher evidence of title, be produced *Doe*

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v. *West*, 1 Blackf., 133; *Smith v. Lorillard*, 10 Johns., 338. The possession of the ancestor raises the presumption that he was seised in fee, and lays a sufficient foundation on which to support this action on the demise of his heirs, until the contrary appear. Bull. N. P., 103.

In this State, the interest of several heirs at law, derived by descent, is, to all substantial purposes, an estate in coparcenary, and must be governed by the law applicable to that kind of interest. A joint demise by coparceners is sufficient to support ejectment. Adams on Eject., 210. The Circuit Court committed no error in referring the evidence to the jury.

It appears by a bill of exceptions, that the defendant claimed title under a sale of the litigated property for non-payment of taxes in 1817, and that for the purpose of establishing his claim, he offered in evidence several documents which, on the motion of the plaintiff, were rejected by the Court. This is also assigned for error. As these documents are not spread upon the record, we have no means of judging of their validity, and must, therefore, presume that their rejection was proper. Among the papers thus excluded

[*87] *was one which is said to be a duplicate of the assessment-roll, and which, it is admitted, was not verified by the certificate of the clerk of the Circuit Court. The law which governed the assessment of taxes upon lands in 1817, required that those duplicates should be so verified. Laws of 1817, p. 134. Admitting the paper in question to be perfect in other respects, the absence of the certificate was a fatal objection to it, and rendered it incompetent to go to the jury.

The Circuit Court overruled a motion of the defendant for a new trial on the ground of newly discovered evidence. The motion was attended by the affidavits of the defendant and his attorney, that they had discovered, since the trial, that there was, on the files of the Probate Court of *Knox* county, a will made by *Ambrose Mallet*, by which he devised a life estate in the disputed property to his widow. The affidavits contained a general allegation of the use of due diligence in making preparation for the defense. But neither the defendant, nor

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his attorney, made any application at the probate office, previous to the trial, for the purpose of ascertaining whether a will existed, or for any other purpose. This certainly was not such diligence as entitled the defendant to a new trial on account of the after discovered evidence of a supposed outstanding adverse title, particularly as it was not stated that the widow was living. Had the defendant searched the proper place for a will—the probate office—he would have been prepared with his evidence in due season. As his want of preparation was the consequence of his own remissness, the motion for a new trial was correctly overruled. *Coe v. Givan*, 1 Blackf., 367.

Per Curiam.—The judgment is affirmed with costs.

C. Fletcher, O. Butler, S. Yandes, and J. Law, for the appellants.

S. Judah for the appellee.

(1) The Court has no authority to nonsuit a plaintiff against his consent. *Booe v. Davis et al.*, Vol. 5 of these Rep., 115.

[*88] *HAMILTON, Executor v. EWING.

PLEADING.—A suit in a justice's Court was entitled, "*Allen Hamilton, Executor of James Wilcox v. Charles W. Ewing*. Debt. Demand, \$34." And a promissory note given by the defendant to *James Wilcox* for \$30, was filed as the cause of action. Held, that the cause of action was insufficient.(a)

ERROR to the *Allen* Circuit Court.

DEWEY, J.—This was an action of debt commenced before a justice of the peace, and taken by appeal to the Circuit Court. The action is entitled on the justice's transcript, "*Allen Hamilton, Executor of James Wilcox v. Charles W. Ewing*. Debt. Demand, \$34." The cause of action was a promissory note by which the defendant promised to pay one *James Wilcox* \$30. The defendant moved the Circuit Court to

(a) *Coldron v. Rhode*, 7 Ind., 151.

The Madison Insurance Company v. Stangle.

dismiss the suit for want of a sufficient cause of action, which was done.

We think this decision was right. There is nothing in the record to show the connection of the plaintiff with the cause of action. The mere description of his person as the executor of *Wilcox* is not enough for that purpose. He might, notwithstanding, have maintained an action on a promise made to himself individually. There should have been an averment to show his interest in the note. *Vandagriff v. Tate et ux.*, 4 Blackf., 174.

Per Curiam.—The judgment is affirmed with costs.

T. Johnson, for the plaintiff.

C. Fletcher, O. Butler, and S. Yandes, for the defendant.

THE MADISON INSURANCE COMPANY v. STANGLE.

PLEADING.—Declaration in debt by the *Madison Insurance Company*, stating that the defendant made and delivered to them his promissory note, and thereby promised to the order of the *Madison Insurance Office* (thereby meaning and intending to make the said note payable to the order of the plaintiffs), &c.” *Held*, that the declaration, for want of a direct averment that the defendant promised the plaintiffs by the name of the *Madison Insurance Office*, was insufficient.(b)

[*89] ***INNUENDO**.—The office of an *innuendo* is not to introduce new matter into pleading, but to explain something which precedes it.

ERROR to the *Jennings* Circuit Court.

DEWEY, J.—“The *Madison Insurance Company*” declared in debt against *Stangle*, that he made and delivered to them his promissory note, and thereby “promised to the order of the *Madison Insurance Office* (thereby meaning and intending to make the said note payable to the order of the plaintiffs), &c.” Demurrer to the declaration, assigning for cause that no promise to the plaintiffs or their order is alleged. The Court

(b) *Williams v. Dickerson*, 8 Blackf., 287.

The State, on the Relation of Vigus, v. Mowbray.

sustained the demurrer, and rendered final judgment against the plaintiffs.

We think the judgment is right. There is not a sufficient averment that the promise was made to the plaintiffs. The promise laid in the declaration is to the *Madison Insurance Office*, and not to the *Madison Insurance Company*. The defect is attempted to be supplied by an *innuendo*. But an *innuendo* is not competent to the accomplishment of that object. Its office is, not to introduce new matter into pleading, but to explain something which precedes it. It can not enlarge the sense of language, or make one thing mean another. There should have been a direct averment that the defendant promised the plaintiffs by the name of the *Madison Insurance Office*. Where the *innuendo* viewed as an averment, it would allege merely that the defendant *designed* to promise the plaintiffs, not that he did actually *promise* them.

Per Curiam.—The judgment is affirmed with costs.

M. G. Bright, for the plaintiffs.

J. G. Marshall, for the defendant.

THE STATE, on the Relation of VIGUS, v. MOWBRAY.

CONSTABLES' BOND—PLEADING.—The cause of action filed before a justice of the peace, in debt against a constable and his surety, was a copy [*90] of an instrument of writing, purporting to be executed by the defendants, in the form of a constable's bond (except that it was not sealed), with an assignment of breaches of the condition appended to it. *Held*, that the cause of action, under the statute, was sufficient.(a)

ERROR to the *Miami* Circuit Court.

DEWEY, J.—This was an action of debt commenced before a justice of the peace by the State, on the relation and for the use of *Vigus*, against one *Huffard*, a constable, and *Mowbray* his surety. The cause of action filed before the justice, was

(a) *Harper v. Pound*, 10 Ind., 34; 16 Id., 259.

Olds and Others v. The State, on the Relation of Brookins.

the copy of an instrument purporting to be executed by the defendants in the usual form of a constable's official bond, except the seals, and several assignments of breaches of the condition appended to it. There was a suggestion of "not found" as to *Huffard*. *Mowbray* appeared before the justice, who rendered a judgment in his favour. The State appealed. In the Circuit Court, on the motion of the defendant, the suit was dismissed on the ground that there was not a sufficient cause of action.

In this, we think the Circuit Court was mistaken. We have a statute which provides, that when any recognizance or bond required by law to be given by any officer, &c., made to the State to secure the payment of money, or performance of duty, has not the form or "substantial matter required by law," the defect may be suggested in the declaration by the person interested, and an action be sustained on such instrument against principal and surety for the recovery of the demand equitably due. R. Stat., 1838, p. 450. The want of seals to the instrument in question is cured by this statute, and the instrument is thereby rendered a good statutory cause of action. As a copy of the paper itself was appended to the assignment of breaches, the defect was apparent, and no other suggestion of it was necessary in the justice's Court.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Fletcher, O. Butler, and S. Yandes, for the plaintiff.

W. Wright, for the defendant.

[*91] *OLDS and Others v. THE STATE, on the Relation of BROOKINS.

CONSTABLE'S BOND—PLEADING.—In a suit in a justice's Court against a constable and his sureties, on a bond conditioned, &c., the bond, without an assignment of breaches, may be filed as the cause of action.

APPOINTMENT OF CONSTABLE BY JUSTICE.—If a justice of the peace, without

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any authority by law, appoint a constable, and take his bond with surety for the discharge of his duties, the appointment and bond are void.(a)

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—This was an action of debt against the plaintiffs in error, commenced before a justice of the peace. The action is founded on a bond executed by *Olds* as a constable, and the other defendants as his sureties, conditioned that *Olds* would faithfully discharge the duties of his office. The bond was filed with the justice as the cause of action. Process was duly served on the defendants, all of whom failed to appear, and the justice rendered judgment against them by default. The defendants appealed.

In the Circuit Court, the defendants moved the Court to dismiss the cause for want of a sufficient cause of action, which motion was overruled. The parties filed an agreed case, upon which judgment was rendered for the plaintiff.

The following are the facts: On the 11th of *June*, 1839, a justice of the peace appointed *Olds* a constable, who filed the bond we have already mentioned, was sworn into office, and acted as such constable until the 1st of *March*, 1840. On the 15th of *November*, 1839, a judgment of the justice was rendered in favour of *Brookins* against one *Sloan* for \$19.00, and on the 18th of the same month, an execution directed to *Olds* as constable issued on the judgment, and was duly put into his hands. Before the return day of the execution, *Olds* collected the money due on the execution, but has neither returned the execution, nor paid the money collected. The present suit against *Olds* was commenced on the 16th of *March*, 1840. He acted as constable by no other authority than the appointment we have mentioned, which was made to supply a vacancy occasioned by the resignation of one of the regularly appointed constables. The appointment of *Olds* was not for any
[*92] special case, and *the bond was given under his general appointment. At the time the appointment was made and the bond given, and at the time the judgment was

(a) See cases cited in *Byers v. The State*, 20 Ind., 47.

Olds and Others v. The State, on the Relation of Brookins.

rendered and execution issued, there were two regularly appointed and qualified constables in the township, competent to discharge the duties of constable in the said case, and in all others in the township.

The cause was submitted to the Court and judgment rendered for the plaintiff.

The first error assigned is the refusal of the Circuit Court to dismiss the cause. There was no error in this refusal. As the cause originated before a justice of the peace, the bond filed was a sufficient cause of action. *Evans v. Shoemaker*, 2 Blackf., 237; *Vandagriff v. Tate*, 4 Id., 174. Besides, the objection not being made before the justice, came too late.

The second assignment of error is, that the justice had no authority to make the appointment, and the bond was consequently void. This objection is fatal. A justice of the peace may appoint a constable in any special case, when he deems it necessary, *pro hac vice*. Rev. Stat., 1838, p. 145. So, if there be no constable in the township, or none able to act, the justice may appoint one to serve until the disability be removed, or there be one regularly appointed. Id., 376. But the facts before us do not bring the case within either of those statutes; and there was, therefore, no authority for the appointment. It follows, that both the appointment and the bond are void. *Wilson v. Hobday*, 4 M. & Selw., 121; *Commonwealth v. Jackson's ex'or. et al.*, 1 Leigh, 485.(1)

Per Curiam.—The judgment is reversed at the costs of the relator. Cause remanded, &c.

C. H. Test, for the plaintiffs.

J. S. Newman, for the defendant.

(1)The Hustings Court of *Williamsburgh*, without any authority of law for the act, appointed a collector of the public taxes for the city, and took his bond with surety for the due collection, &c., payable to the Governor and his successors. Held, that the bond was not valid and obligatory on the surety. *Commonwealth v. Jackson's ex'or. et al.*, cited in the text.

Carnahan v. Brown.

[*93]

*CARNAHAN v. BROWN.

REPLEVIN BAIL, LIABILITY OF.—If a judgment in the Circuit Court in a personal action be replevied, the bail is a joint debtor in the judgment with the principal.(a)

SAME—EXECUTION.—After the death of the principal in such case, and within a year after his death, a *fi. fa.* was issued on the judgment against the principal and bail, describing the latter as replevin bail. *Held*, that the execution was unobjectionable.

SAME.—The *fi. fa.* in such case, though nominally against the principal and bail for the sake of conforming to the judgment, can be enforced only against the latter on account of the death of the former.

APPEAL from the *Tippecanoe* Circuit Court.

DEWEY, J.—This was a motion to set aside an execution for irregularity. *Carnahan*, the appellant, recovered a judgment in a personal action against one *Ward* in the Circuit Court. *Brown*, the appellee, entered himself bail for the stay of execution. *Carnahan* sued out a joint *fi. fa.* upon the judgment against *Ward* and *Brown*, describing the latter as replevin-bail. Before the execution issued, and within a year preceding the trial of the motion, *Ward* died. On the motion of *Brown*, the Circuit Court quashed the execution.

We think there was no good reason for setting aside the execution. By virtue of the replevin, *Brown* became a joint debtor with *Ward* in the judgment. Judgments in personal actions where there are several plaintiffs or defendants, one of whom may have died after judgment rendered, may be enforced by or against the survivors without a *scire facias*; but the writ of execution in such cases, in order to conform to the judgment, must be sued out in the joint names of all the plaintiffs or defendants. 2 Tidd's Pr., 1048; 2 Saund., 72 k, n. 3.

This principle is not affected by the provision of our probate act, that no action shall be brought against any executor or administrator until the lapse of one year from the date of his appointment. That provision was designed to give the execu-

(a) *Egbert v. The State*, 4 Ind., 400; 3 Ind., 533.

Anderson v. Hamilton.

tor or administrator time to adjust the estate of the deceased, and to ascertain whether it be solvent or not. It was not intended to postpone the liability of a co-debtor with the deceased, whether surety or not. Nor is the enactment in the execution law, that if it appears upon the face of [*94] an *execution, or by indorsement thereon, that a part of the defendants are the sureties of the others, the property of the principal shall be first taken, applicable to this cause. That provision applies only to executions which are operative against all the defendants. The execution in question, though nominally against *Ward* and *Brown* for the sake of conforming to the judgment, could be enforced against *Brown* alone, on account of the death of *Ward*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Ingram and *Z. Baird*, for the appellant.

R. A. Lockwood, for the appellee.

ANDERSON v. HAMILTON.

PLEADING—VARIANCE.—The declaration in a suit against *A* stated that the defendant, at the State of *Kentucky*, viz., at the county, &c., made his promissory note, &c. The note offered in evidence was a joint and several note of the defendant and two other persons, and was silent as to the place of its execution. *Held*, that there was no material variance.

ERROR to the *Jackson* Circuit Court.

SULLIVAN, J.—Debt on a promissory note. Plea, *nil debet*. By consent of parties the cause was tried by the Court. Judgment for defendant. The averment in the declaration is, “that on, &c., the defendant, at the State of *Kentucky*, to wit, at the county of *Jackson*, made his promissory note by which he promised to pay to the plaintiff, &c.” On the trial, the plaintiff introduced in evidence a joint and several note made by the defendant and two others, corresponding in date and

Peoples v. The State.

amount with that described in the declaration, but was silent as to the place of its execution.”

We think the contract offered in evidence was substantially the same as that laid in the declaration. The plaintiff had a right to sue one of the makers of the note without reference to the others, the contract being joint and several.

The words in the declaration “at the State of [*95] *Kentucky*” *are superfluous. They were unnecessarily introduced, and the variance, if any exists, is not material. 3 Camp., 303; *Reagan et al. v. Maze*, 4 Blackf., 344.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. C. Griffith, for the plaintiff.

HEISTAND and Others v. KUNS, in Error.

The 18th section of the statute regulating the practice in chancery, which authorizes absent non-resident defendants, within a year, to open decrees rendered against them by appearing and answering the bill, paying costs, &c., applies to the Probate Courts, and all others in the State having chancery jurisdiction. Rev. Stat., 1838, p. 440.

PEOPLES v. THE STATE.

FORGERY—INDICTMENT.—An indictment charged the defendant with knowingly retaining in his possession certain dies, and plates, and other apparatus and instruments, made use of in forging, &c. *Held*, that the words “other apparatus and instruments,” in the indictment, were surplusage. *Held*, also, that to convict the defendant, it must be proved that he knowingly retained in his possession some instrument named in the indictment.

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ERROR to the *Henry* Circuit Court.

SULLIVAN, J.—This was an indictment charging the defendant in the Court below, with retaining in his possession certain dies, and plates, and other apparatus, made use of in counterfeiting silver coin current in this State. The charge in the indictment is, “that the defendant on, &c., having in his possession and custody certain dies, and plates, *and other apparatus and instruments*, made use of in forging and counterfeiting the silver coin which is current and in [*96] circulation *in the State of *Indiana*, did then and there knowingly, &c., retain and keep in his possession the said dies and plates, *apparatus and other instruments*, made use of in forging, &c., with intent, &c.” Verdict of guilty, and judgment on the verdict.

The case comes before us on exceptions taken to the opinion of the Court in giving certain instructions to the jury, and in refusing instructions asked by the defendant.

Among the instructions asked by the defendant was the following: “That the State must prove, that the defendant knowingly retained in his possession some of the instruments specifically named in the indictment; and that proof of his having the possession of other apparatus not named in the indictment, though such as might be used in counterfeiting, would not be sufficient, under this indictment, to convict the defendant.” The Court refused the instruction asked, and thereupon instructed the jury “that to satisfy the allegation in the indictment, there must be proof that the defendant kept and retained in his possession a die, or plate, *or other instrument or apparatus*, used for counterfeiting the current coin of the State.”

We have heretofore decided in a case of this kind, that the indictment must describe, by name or otherwise, the instrument alleged to be in the defendant’s possession; and that without such description, the indictment would be insufficient. *Chamberlain v. The State*, May term, 1841. In the case before us, the indictment charges that the defendant retained in his possession certain dies, and plates, and other apparatus and

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instruments, made use of in counterfeiting silver coin current in the State. The words "other instruments and apparatus" in the indictment are superfluous; and the offense really charged against the defendant is, that he knowingly retained in his possession certain dies and plates made use of in counterfeiting. It was therefore necessary to prove, in order to convict the defendant, that he did retain in his possession the dies or plates named in the indictment. If it were otherwise, a defendant might be convicted on evidence varying materially from the facts charged against him.

We are of opinion, therefore, that the Circuit Court [97] erred *both in giving the foregoing instruction, and in refusing the instruction asked by the defendant. Under the instruction given, the defendant may have been convicted for retaining the possession of an instrument not named in the indictment, and in reference to which he had no notice and had not prepared his defense.

Other instructions were asked by the defendant, but the Court refused to give them as asked. The instructions given, however, embraced substantially all that the defendant could legally ask, and, with the exception of the instruction above noticed, were correct.

For the errors above named, the judgment must be reversed.

Per Curiam.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

C. H. Test, for the plaintiff.

H. O'Neal, for the State.

LATHAM and Another v. BARLOW and Others.

ABSCONDING DEBTOR.—When the property of an absconding debtor is liable to seizure by foreign attachment for a debt, the remedy of his creditor is not in chancery, but at law.

ERROR to the *Gibson* Circuit Court.

Latham and Another v. Barlow and Others.

DEWEY, J.—*Barlow, Ames, and Co.*, sued *Latham* and *Potter* in chancery. They allege in their bill, that *Latham*, a minor, fraudulently represented himself to be of full age; that believing his assertions, they trusted him with necessities to the amount of \$93.00; that he absconded without paying the debt; that he left \$200 worth of property in real and personal estate; that *Potter*, his regular guardian, had the control of his personal property, and of the rents and profits of his land, amounting to \$150; and that *Potter* refused to pay them. The prayer of the bill is, that the complainants be decreed to be paid their

demand out of the funds in the hands of *Potter* as the [*98] guardian of *Latham*, *or, if the same be insufficient for that purpose, that the real estate be sold, and the proceeds applied to the payment of the debt. *Potter* demurred to the bill for want of equity. The demurrer was overruled; and he answered, denying all knowledge of the transactions between the complainants and *Latham*; admitted his guardianship, and that he had in his hands funds belonging to *Latham* more than sufficient to pay the complainants' claim, which he had refused to pay, because he had himself, at all times, furnished his ward with whatever was necessary and proper for him. There was a general replication.

The complainants proved their account, and that, with the exception of a few items, the articles which they sold to *Latham* were necessary for a young man in *Latham's* situation. They also proved that he had absconded; but they failed to prove that he represented himself to be of age. There was an order of publication against *Latham*, but it was never published. He neither joined in the demurrer to the bill, nor did he answer. The record states that *Latham* appeared by his guardian *Potter*, and that the cause was submitted for final hearing "on bill, answer, replication, and depositions." The Court decreed that *Potter*, as guardian of *Latham*, should pay out of the funds of the latter to the complainants the sum of \$91.00 and costs.

We shall confine our attention to one of several questions which might be raised on this record, that of the jurisdiction of a Court of equity over the subject matter of the bill. We

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think no such jurisdiction exists. This Court has repeatedly decided that, under certain circumstances, a creditor may in chancery reach the equitable interest of his debtor in real or personal property. *Kipper v. Glancey*, 2 Blackf., 356; *O'Brien v. Coulter*, Ib., 421; *West v. McCarty*, 4 Ib., 244. But in the first and last of these cases it was held, that when the property of an absconding debtor is liable to seizure by foreign attachment, the remedy is at law only. The bill before us presents a case of this kind. It alleges that *Latham* left real and personal estate; and it shows no difficulty in the way of reaching it by attachment. The bill must be dismissed.

[*99] **Per Curiam*.—The decree is reversed with costs.

Cause remanded, with instructions to the Circuit Court to dismiss the bill without prejudice, &c.

J. Pitcher, for the plaintiffs.

E. S. Terry, for the defendants.

MARTIN and Others v. PACE and Others.

CONVEYANCE—ADVERSE POSSESSION.—A sale and conveyance of real estate in the adverse possession of a third person, made by commissioners under an order of Court in a suit for partition, are not a valid consideration for a note given for the purchase-money.(a)

SAME—MAINTENANCE.—If a person out of possession convey land held adversely by a third person, the conveyance is void on the ground of maintenance, and the title of the land remains in the grantor.(b)

APPEAL from the *Knox* Circuit Court.

BLACKFORD, J.—*Martin* and others, for the use of the devisees of *Thomas Jones*, deceased, brought an action of debt against *Pace* and others. The suit is founded on a sealed note for \$400, payable to the plaintiffs, commissioners, for the use of the devisees, &c., of *Thomas Jones*, deceased.

There are two special pleas in bar: the first it is unnecessary

(a) *Major v. Brush*, 7 Ind., 232.

(b) *Webb v. Thompson*, 23 Ind., 428; 22 Ind., 55; 9 Ind., 306; 7 Ind., 398.

to notice; the second is as follows: That *Michael Conway* and wife with others, claiming to be the heirs at law [*100] *and devisees of *Thomas Jones*, deceased, procured in an action for partition, an order of the *Knox* Circuit Court for the sale of a certain tract of land situate in *Knox* county, which they claimed as such heirs and devisees; that at a sale by the plaintiffs as commissioners under the said order, one of the defendants purchased the land, and received from the commissioners a conveyance of all the title and interest of the said heirs, and the defendants gave the note now sued on for the purchase-money; that at the time of the sale the land was, and ever since has been, held and possessed adversely by one *William Cox* and others under him; that *Cox* claimed the land by virtue of a deed of conveyance made to him by the collector of said county, founded on a sale for taxes, &c.; and that, therefore, the consideration of the note was void. General demurrers to the pleas, and judgment for the defendants.

We think the second plea is a bar to the action. The persons who claimed the land as co-parceners, could have nothing more than a *right of entry*, the land being held at the time adversely by another; and it is a principle of the common law, that such a right is not assignable. Co. on Litt., 266; *Jackson v. Demont*, 9 Johns. R., 55. The doctrine stated in the case just cited, viz., that a feoffment upon maintenance or champerty is good as between the feoffor and feoffee, and only void against him who has right, applies only to conveyances within the provisions of the statute of *Richard* the 2d. 1 Hawk. Pl. Cr., 263. It has no application to the case before us, and if it had, there would still be reason to doubt whether the demurrer to the plea could be sustained.

According to the current of the *English* cases, if a disseisee levy a fine to a stranger, the disseisor shall retain the land forever. *Buckler's* case, 2 Co. Rep., 54; 2 Preston on Abstracts, 206. In *New York* it is held, that if a person out of possession convey land held adversely by another, the conveyance is void for maintenance, and the title to the land remains in the grantor. *Williams v. Jackson*, 5 Johns. R., 489.

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We entirely approve of the *New York* decision, that the conveyance, which is void on the ground of maintenance, [*101] *creates no forfeiture of the grantor's title; but if it did, that circumstance would not weaken the defense under consideration. The authorities all concur that the grantee, in a case like the present, takes nothing by the deed.

The opinion now expressed, that the conveyance before us is absolutely void, is in accordance with a former judgment of this Court. *Fite v. Doe, d. Bingham*, 1 Blackf., 127.

It is decided that if a person sell land, held at the time adversely by another, the sale is not a valid consideration for a promise to pay the purchase-money, the sale being a species of maintenance, and void on general principles of law and public policy. *Whitaker v. Cone*, 2 Johns. Cas., 58. It is also decided, that the sale and conveyance by commissioners of real estate, made by virtue of an order of Court in a suit for partition, can pass no title to the purchaser, if the land, at the time of the sale, was in the adverse possession of a third person. *Jackson, d. Smith v. Vrooman*, 13 Johns. R., 488.

It is clear from the authorities we have referred to, that the note on which the present suit is founded, was given without consideration, and that the demurrer to the second plea was correctly overruled.

Per Curiam.—The judgment is affirmed with costs.

A. Kinney and *A. T. Ellis* for the appellants.

S. Judah, for the appellees.

HENDERSON v. REEVES.

WITNESS.—In a suit against *A* and *B*, alleged to be partners of the firm of *B* and *Co.*, on a note executed in the name of the firm, *C* is a competent witness for the plaintiff to prove that *A* was a member of the firm, although a judgment have been previously obtained by the plaintiff against *C* on the same note.

FORMER ADJUDICATION.—Debt against *A* and *B* on a joint note alleged to

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have been executed by them and their deceased partner *C*. Plea, *nil debet*. Held, that the jury might consider the suit barred by a former judgment against *C* in a suit on the same note.^(a)

ADMISSION.—A defendant, by permitting the death of one of the plaintiffs to be suggested on the record without opposition before the trial commences admits the suggestion to be true.

[*102] CREDITS ON NOTE.—*Credits entered on a note upon which suit is brought, are a proper matter for the consideration of the jury in estimating the amount due.

ERROR to the *Allen* Circuit Court.

DEWEY, J.—*Reeves* and *McLain* sued *Zenas Henderson* and *Dewit C. Stephens*, surviving partners, in debt. The declaration sets forth, among other things, two promissory notes alleged to be executed by the defendants and their deceased partner, *William A. Henderson*, in the name and style of the firm of *D. C. Stephens* and *Co.* A return of "not found" was suggested as to *Stephens*. *Zenas Henderson* pleaded the general issue, verified by affidavit. The death of *McLain*, after the commencement of the suit was suggested upon the record; and his co-plaintiff *Reeves* entered the *similiter* to the general issue. Verdict and judgment for the plaintiff.

On the trial, the plaintiff produced one *Mariam* as a witness, to prove that *Zenas Henderson* was a member of the firm of *D. C. Stephens* and *Co.* The defendant objected to his competency on the score of interest; and to sustain his objection he proved by the record and the admissions of the plaintiff, that *Reeves* and *McLain* had brought a former suit on the notes mentioned in this declaration, against *William A. Henderson*, *Dewit C. Stephens*, and the witness, as constituting the firm of *D. C. Stephens* and *Co.*, and had recovered a judgment against *Henderson* and the witness, "not found" having been returned as to *Stephens*. The Court overruled the objection, and suffered *Mariam* to testify in behalf of the plaintiff.

The argument advanced by the plaintiff in error to show the incompetency of the witness is, that *Mariam* being liable by the judgment against him in the former suit, to pay the amount

(a) *Devol v. Halstead*, 16 Ind., 287.

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of the notes given by the firm of *D. C. Stephens and Co.*, had an interest in establishing the fact that the defendant was a member of that firm, in order to have contribution against him, should he, *Mariam*, be compelled to pay the money. All this may be true, but it does not prove that *Mariam* has any interest in the event of this suit, because not being a party to it, he can not avail himself of this record to establish the joint liability of *Henderson*. To do that, and to show his liability to contribution, *Mariam* must resort to evidence independent of both judgments, as he is not himself a party to one, nor *Henderson* to the other. It is evident, therefore, that he could gain no advantage by testifying that *Henderson* was a member of the firm of *D. C. Stephens and Co.* This view of the subject is sustained by the following cases. 1 *Strange*, 35; *Blackett v. Weir*, 5 B. & C., 385; *Hall v. Curzon*, 9 B. & C., 646. Had *Mariam* been a party to the suit, who had suffered judgment to go against him by default, he would not, according to the cases of *Brown v. Brown*, 4 Taunt., 752, and *Mant v. Mainwaring et al.*, 8 Taunt., 139, cited by the plaintiff in error, have been a competent witness. His interest would be evident. He would gain a manifest advantage by making the defendant jointly liable with him in the judgment, the record of which he could use in a suit for contribution. The exclusion of the witnesses in these cases and others of a similar character has been said to rest, in part at least, upon the general principle that a party to the record is an incompetent witness. But that this is not the true reason has been clearly shown in the later decision of *Worrall v. Jones et al.*, 7 Bingham, 395, in which it was held that a disinterested party to the record was a competent witness. The Circuit Court committed no error in admitting *Mariam* to testify.

The defendant, having given in evidence to the jury the record of the former trial above mentioned, and it being admitted by the plaintiff that the cause of action in that suit, so far as the notes are concerned, was the same as in this, and that two of the defendants in the former suit, *Stephens* and *William A. Henderson*, were two of the partners who are alleged to

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have executed the notes described in this declaration, moved the Court to instruct the jury, that they were at liberty to consider the former judgment a bar to this action so far as it is founded on the notes. The instruction was refused. The charge should have been given. This action is founded, in part, upon joint contracts alleged to be made by *William A. Henderson* and the original defendants in the suit. The former judgment against *Henderson* on the same contracts extinguished them at least as to him. It showed that the joint contracts laid in the declaration did not exist when this suit was commenced.

It, therefore, authorized the jury to consider this action [*104] as barred. This is the principle *established in the case of *Taylor v. Moseby*, decided by this Court, *May* term, 1841.

The Court refused to instruct the jury, that to enable the plaintiff, *Reeves*, to recover, he must have proved on the trial, the death of his co-plaintiff, *McLain*. There was no error in this. The defendant, by suffering the death of *McLain* to be suggested on the record without opposition before the trial commenced, admitted the fact.

The Court also refused to instruct the jury, that the "indorsements which appeared upon the notes adduced by the plaintiff," if against him, were evidence for their consideration. These "indorsements," we presume, were credits entered on the notes; if so, they were certainly proper matter for the consideration of the jury in estimating the amount due.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and *W. H. Coombs*, for the plaintiff.

T. Johnson, for the defendant.

BELLAIR v. THE STATE, in Error.

NO illegality of the proceedings of the board doing county business, relative to the selecting, &c., of the grand jurors, is a cause for setting aside an indictment. Stat., 1841, p. 126.

An objection to the mode in which such board discharged its duty, as to the selecting and drawing of grand jurors, must be made by way of challenge before the grand jurors are sworn. *Ibid.* An indictment for betting on the result of an election, must state for what purpose the election bet on was held; that is, whether it was for President of the *United States*, for Governor of the State, &c.

[*105]

*THE STATE v. GRAETER.

SELLING LIQUOR — INDICTMENT. — An indictment for retailing spirituous liquors within the borough of *Vincennes*, without license by the president and trustees, &c., need not aver the existence of the corporation, nor of an ordinance regulating the sale, &c., nor show the kind of liquor sold.(a)

ERROR to the *Knox* Circuit Court.

SULLIVAN, J.—The defendant was indicted for retailing spirituous liquors, without license, in the borough of *Vincennes*. The charge in the indictment is, that the defendant, not being licensed by the president and trustees of the borough of *Vincennes*, according to law, to sell spirituous liquors within the bounds of said borough, did unlawfully sell, &c. The Court quashed the indictment.

By the 17th section of the act entitled “An act respecting the borough of *Vincennes*,” approved *January* the 27th, 1836, L. Laws, 1836, p. 31, it is declared that it shall not be lawful for any person within the bounds of said borough, to sell, by a less quantity than a quart at a time, any spirituous liquors, for-

(a) *Fetterer v. The State*, 18 Ind., 388; 17 Ind., 444.

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sign or domestic, unless such person, in addition to a license obtained from the board doing county business, obtain a license from the corporation; and the president with the consent of the trustees may grant the same, &c. The 22d section of said act provides, that the act shall not take effect until it shall have received the sanction of a majority of the legal voters, &c.

The first objection taken to the indictment is, that it does not show that the corporation, authorized by the act above referred to, is in existence, nor that the president and trustees have adopted an ordinance to regulate the sale of spirituous liquors. The act of 1836 was amended by a subsequent act, approved *February* the 14th, 1838. L. Laws, 1838, p. 391. The 6th section of the amendatory act declares that *that act*, and the act to which it is an amendment, shall be deemed and taken to be public acts, and as such may be given in evidence without pleading, and without proof of the adoption of the same by the people of *Vincennes*. The averment, therefore, of the existence of the corporation, is made unnecessary by the express terms of the law.

Nor was it necessary to aver that an ordinance had [*106] been *passed regulating the sale of spirituous liquors.

The traffic is prohibited unless a license be obtained; and if the corporation enacts no law licensing the trade, it can not be carried on within its bounds.

The question is also submitted, whether the indictment should not show the kind of spirituous liquor which the defendant is alleged to have sold? We think it is not necessary, that the name or mixture should be stated in the indictment. An indictment is sufficiently certain without it, to inform the defendant of the offense with which he is charged, and to guard him against a subsequent conviction for the same offense. 5 Pick., 41; Ib. 42; 1 Chitt. R., 698; 3 Camp., 73.(1)

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

S. Judah, for the defendant.

(1) An indictment charged that the defendant, on, &c., without license, sold

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to one *T. G.* one pint of spirituous liquors, against the peace, &c. The defendant objected to the indictment, &c.

Shaw, C. J.—"The first exception is, that the species of liquor should have been expressed, as 'brandy,' 'rum,' &c.

"The Court are of opinion, that this was not necessary; but that it is sufficient to use the words of the statute, 'spirituous liquors,' and that this is sufficiently specific and certain. The description in this statute is, 'any brandy, rum, or other spirituous liquors.' We think the specific terms, brandy and rum, are not used to constitute distinct offenses or classes of offenses, but they were put by way of instance, so connected with the larger term, 'spirituous liquors,' as to give efficiency to the rule of construction *ejusdem generis* and qualify those more general words.

"And as coming within the same principle, and a necessary consequence of it, we think the charge of the Court was correct, that proof of the sale of brandy was good evidence to support an indictment for selling spirituous liquors." *Commonwealth v. Odlin*, 23 Pick., 275, 279.

EMORY v. THE STATE.

EXTORTION—INDICTMENT.—An indictment charged that the defendant as constable traveled four miles to serve an execution, for which
[*107] travel he was entitled, as mileage, to *sixteen cents; that, corruptly, &c., he extorted thirty-two cents for said mileage; whereas but sixteen cents were due, &c. *Held*, that the indictment was valid.

ERROR to the *Boone* Circuit Court.

BLACKFORD, J.—Indictment. The offense is stated as follows: That the defendant being a constable, on, &c., at, &c., traveled four miles to serve an execution, &c., of which travel as mileage he was entitled to sixteen cents; that the defendant, as such constable, knowingly, corruptly, &c., for his said mileage in going four miles, &c., did extort, &c., thirty-two cents for his costs as such constable, &c.; whereas in truth and in fact but sixteen cents were due, &c.

Motion to quash the indictment overruled.

Plea, not guilty, and the cause submitted to the Court. It was proved that the defendant had traveled four miles from the office of the justice to serve the execution, and then four miles back to return it. The Court found the defendant guilty

Howk v. Pollard, Assignee.

of extorting sixteen cents for a fee as charged in the indictment, and assessed his fine at \$1.60.

One objection made to the indictment is, that in one place it states that thirty-two cents were extorsively taken, and, in another, that sixteen cents of that sum were really due. This objection is insufficient. The indictment might, no doubt, have been more explicit, but, we think, the offense is described with sufficient certainty.

Another objection is, that the officer was entitled to take the mileage which is charged to have been taken. We think, however, that the statute only gives mileage, viz., four cents a mile, for the distance traveled from the justice's office to the place to which the officer goes to execute the writ. Rev. Stat., 1838, p. 296.

The judgment is for ten times the amount found to have been unlawfully taken, and is in conformity with the statute. Rev. Stat., 1838, p. 216.

Per Curiam.—The judgment is affirmed with costs.

R. A. Lockwood, for the plaintiff.

H. O'Neal, for the State.

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*HOWK v. POLLARD, Assignee.

VENDOR AND PURCHASER—MISREPRESENTATIONS AS TO QUANTITY OF LAND.—If a tract of land be sold with a representation that it contains a certain number of acres, and there be a deficiency in the quantity, the vendee is entitled to an abatement of the purchase-money for so much as the quantity falls short of the representation. (a)

PLEADING—DEMURRER.—If a plea profess to answer the whole cause of action and only answer a part, it may be demurred to generally.

PLEADING—CONSIDERATION.—Debt on a note for the payment of money. Plea in bar of the action, that the note was given in consideration that the payee would assign to the defendant certain certificates for three tracts of land, each tract containing eighty acres; that the payee did not assign the certificates for the tracts of land containing eighty acres each, wherefore, &c.

(a) *Davis v. Jackson*, 22 Ind., 233; *Coz v. Reynolds*, 7 Ind., 257; 1 Ind., 267.

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Held, that the plea was a *negative pregnant*, and therefore bad on special demurrer.

SAME.—If to a plea of no consideration as to part of a note sued on, the plaintiff reply that the note was not made without consideration, the replication is bad.

ERROR to the *Cass* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Pollard*, assignee, &c., on a sealed note for the payment of money.

Three pleas: 1, *Actio non*. The note was given in consideration, that the payees would assign to the defendant certain certificates for three tracts of land, each tract containing eighty acres. Averment, that the tracts of land did not contain eighty acres each, &c. Wherefore, &c. 2, *Actio non*. The consideration of the note was as stated in the first plea. Averment, that the payees did not assign the certificates for the tracts of land containing eighty acres each. Wherefore, &c. 3, As to \$400 part, &c., no consideration as to that part.

The replications to the first and second pleas are not set out in the transcript. Replication to the third plea, that the note was not made without consideration.

On the trial, the defendant asked a witness, the county surveyor, what number of acres each of the tracts of land mentioned in the plea contained. The question was objected to and the objection sustained.

Verdict and judgment for the plaintiff.

We think the question asked the witness on the trial, as to the number of acres contained in the tracts of land, ought to have been answered. If the tracts do not contain the number of acres which the vendors represented them to contain, the defendant is entitled to an abatement out of the [*109] *purchase-money for so much as the quantity falls short of the representation. 1 *Sugd. Vend.*, 383; *Hill v. Buckley*, 17 *Ves.*, 394. The verdict and judgment are therefore erroneous.

It is proper to notice, that the first plea professes to answer the whole cause of action, and is only an answer to a part. It may therefore be demurred to generally.

The State v. Ringer.

The second plea tenders an informal issue, and may therefore be specially demurred to. The traverse in that plea, that the vendors had not assigned the certificates for tracts of land containing eighty acres each, is too large. The plea is a *negative pregnant*. It implies that the certificates for the tracts containing less than eighty acres each had been assigned; and that implication destroys the effect of the plea as a bar to the whole cause of action.

The replication to the third plea is also objectionable. The circumstance that this plea is only pleaded to a part of the cause of action, seems to have been overlooked by the plaintiff.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Wright, for the plaintiff.

C. B. Smith, for the defendant.

THE STATE v. RINGER.

DISTURBING MEETING—INDICTMENT.—An indictment for disturbing a religious society, &c., may charge the defendant, in the same count, with disturbing the society and its members.

SAME.—Such indictment need not state the name of the society.

ERROR to the *Wayne Circuit Court*.

SULLIVAN, J.—The defendant was indicted for disturbing a religious society convened for public worship. The indictment was quashed by the Circuit Court.

The charge, as laid in the indictment, is that the defendant “being present at and when a certain religious society was convened and met together for the worship of Almighty [*110] God, *did then and there interrupt, molest, and disturb said society and meeting, and the individual members thereof, by then and there in a loud, insulting, and boisterous manner talking, &c.”

The objections made to the indictment, are, 1, That it con-

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tains two distinct offenses in the same count, viz., disturbing the society; and disturbing the individual members of the society. 2, That it does not set forth the name by which the society so convened was known.

The indictment is not liable to the first objection. Disturbing a religious society, or the individual members thereof, is made indictable by the statute. The indictment in the same count charges that the defendant did both; and if upon his trial, he had been found guilty of either of the offenses so charged, it would have been sufficient. If an indictment charges that a defendant did *and* caused to be done a particular act, it is enough to prove either, provided it be shown that the defendant has committed a substantive crime therein specified. • 1 Ch. Cr. Law, 250, 251; 2 Camp. R., 583, 646; *State v. Kuns*, May term, 1840.

The second objection is equally untenable. It is not necessary to the existence of a society convened for public worship, that it should be known by any distinctive or sectarian name. Men of different creeds may meet together to unite in public worship, and when so convened, they form a society to which the statute extends its protection.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal and *D. Macy*, for the State.

G. B. Tingley, for the defendant.

TATE and Another v. THE STATE.

DISINTERRING DEAD BODY—AIDING AND ABETTING.—A person, without being actually present at the unlawful disinterment of a dead body, may be found guilty of the offense, if, with the intention of giving assistance, &c., he be near enough to afford it, should it be needed.

SAME.—On the trial for such offense, testimony tending to prove the defendant's co-operation, &c., should be referred to the jury.

[*111] **SAME.**—*Such offense consists not merely in the removal of the dead

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body, but in its removal without the consent of the deceased given in his lifetime, or of his near relatives given since his death.

SAME—INDICTMENT.—An indictment in such case, charging the defendant with removing from its grave a certain deceased child of *N. H. Burke*, “that had yet no name given to it,” without the consent, &c., is sufficient.

ERROR to the *Fayette* Circuit Court.

SULLIVAN, J.—The defendants, together with *G. W. Riddell* and *J. Vandagrifft*, were indicted for disinterring a dead body. *Vandagrifft* did not appear. *Riddell*, *Tate*, and *Hawkins* pleaded not guilty. *Riddell* was acquitted by the jury. Verdict of guilty against *Tate* and *Hawkins*, and judgment on the verdict.

The indictment contains two counts. The first is for disinterring the dead body of a deceased child of *N. H. Burke*, from, &c., without the consent, &c. The second is for removing and taking from its grave a certain other deceased child of said *Burke*, “that had yet no name given to it,” without the consent, &c.

At the trial, the defendants asked the Court to give the following instructions to the jury: 1, “That notwithstanding *Vandagrifft* may be guilty, and were he upon his trial, might, from the evidence, be found guilty, yet that fact will not authorize the jury to find *Tate* and *Hawkins* guilty because they were in the room where the body was seen, unless the jury are satisfied from the evidence that *Tate* and *Hawkins* were at the burying-ground, and removed, or assisted in removing, the body from the place of its interment.” 2, “If the jury have rational doubts about *Tate* and *Hawkins* being at the burying-ground, and assisting in the removal of the body from the place of its interment, they must acquit.” The Court correctly refused these instructions.

It is not necessary to constitute the offense of which the defendants are indicted, that all the parties to it should be actually present aiding and abetting in the commission of the fact. If with the intention of giving assistance, a person be near enough to afford it should it be needed, he is, in construction of law, present aiding and abetting. Arch. Cr. Pl., 4.

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As in an indictment for privately stealing from a shop, two of the defendants were in the shop, and the other remained outside to co-operate, it was held that all were equally [*112] *guilty. 1 Russ. & Ry., 343. And a person waiting outside of a house to receive goods, which a confederate is stealing in the house, is a principal. *Rex v. Owen*, 1 Moody, 96. So in cases of night poaching, all who are at the place, each acting his part with a common intent, are equally guilty, although some only are bodily upon the land. 7 Carr. and Payne, 282; *Ib.*, 300.

The record does not contain the testimony in the cause. If, however, the testimony tended to prove the co-operation of *Tate* and *Hawkins* in the offense charged, it was the province of the jury, and not of the Court, to weigh it, and determine whether they were guilty or not.

The Court having refused the foregoing instructions, gave the following, viz.: "If you should be satisfied that the defendants, or any of them, at any time within two years, at this county, dug up and removed an infant child of *Nahum Burk* from a public burying place and the place of interment, you may find them, or such of them as were engaged in it, guilty under the thirty-sixth section of the act relative to crime and punishment." In this the Court erred, we have no doubt inadvertently. The offense does not consist merely in the removal of a dead body, but in its removal without the consent of such deceased person obtained in his or her lifetime, or of the near relatives of the deceased since his or her death. The Court, therefore, should have instructed the jury, that they must be satisfied also, that the removal was made without the consent required by the statute. With that qualification to the instruction, it may be the jury would not have found the defendants guilty.

A motion was also made in arrest of judgment, on account of the insufficiency of the indictment. The Court refused the motion. In this there was no error. We think the second count in the indictment is good.

Watkins v. Gregory.

On account of the erroneous instruction given, the judgment must be reversed.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

S. W. Parker, for the plaintiffs.

H. O'Neal, for the State.

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*WATKINS v. GREGORY.

CONVEYANCE, WHEN A MORTGAGE.—An absolute conveyance of real estate, and the grantee's bond of the same date for a reconveyance to the grantor on his payment of a certain sum of money, amount to a mortgage.^(a)

RECOVERY BACK OF PURCHASE-MONEY.—If the money in such case be duly paid, and the grantee refuse to reconvey, he is liable to a suit on the bond.

EQUITY OF REDEMPTION MAY BE SOLD.—An equity of redemption on a mortgage in fee, whether the mortgagor be in possession or not—provided there be no adverse possession—may be sold on an execution at law.

PLEADING.—A substantial defect in a declaration may be cured by admissions in the plea.

APPEAL from the *Warren Circuit Court*.

BLACKFORD, J.—This was an action of debt, brought by the appellant against the appellee, on a penal bond dated the 12th of *June*, 1839.

The declaration sets out the condition of the bond which is to the following effect: That if, as soon as the plaintiff paid four certain notes which the defendant had assigned to one *Thompson*, and two other notes which the defendant held against the plaintiff, all of which notes were payable on the first of *January*, 1840, the defendant should convey to the plaintiff a certain lot of ground in the town of *Milford* and county of *Warren*, then the bond to be void. Averment, that the plaintiff afterwards, to wit, in *October*, 1839, and before the notes became due, paid the notes to the persons entitled; and that afterwards, in *February*, 1840, he demanded of the

(a) *Heath v. Williams*, 30 Ind., 495; 22 Id., 427; 4 Id., 101; Id., 628.

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defendant a deed for the lot, which deed was refused, &c. Whereby, &c.

There are three pleas.

1, That the plaintiff did not pay the notes at the time they became due, nor at any other time, &c.

2, That the plaintiff, in order to secure the payment of the notes mentioned in the condition of the bond, executed a conveyance in fee for the lot to the defendant on the 12th of *June*, 1839, which conveyance was absolute on its face, but which was intended as a security for the payment of the notes; that the bond sued on was executed at the same time with the conveyance, was a part of the same transaction, and was a de-
[*114] feasance to the conveyance; that in *October*, 1839, *and before the notes became due, the plaintiff paid the notes, and the estate was thereby revested in the plaintiff.

3, This plea sets out the same facts that the second contains, respecting the execution of the conveyance to secure the payment of the notes, and the execution of the bond as a defeasance, &c. It then avers, that one *Stewart* and others afterwards obtained a judgment in the *Warren* Circuit Court against the plaintiff, and that the defendant, on the 5th of *December*, 1839, purchased the lot described in the declaration at a sheriff's sale on an execution on the judgment.

Issue was joined on the first plea, and general demurrers were filed to the second and third.

The demurrers were overruled, and final judgment rendered for the defendant.

The demurrer to the second plea should have been sustained. It is true, that the conveyance and bond, as stated in the plea, amount to a mortgage; 1 *Powell on Mort.*, 4; *Peterson v. Clark*, 15 *Johns.*, 205; but yet as the defendant had expressly covenanted to reconvey the land to the plaintiff on the due payment of the mortgage-debt, he was bound, when the payment was so made, to execute the conveyance on demand, and his refusal to do so was a breach of the condition of the bond. It was not the agreement of the parties, that the conveyance should be void if the debt were duly paid, but that if the payment should

be so made, the defendant would reconvey the lot. The due payment of the debt, therefore, did not revest the title in the plaintiff; but it gave him a right to demand a reconveyance. 1 Powell on Mort., 9, note.

The facts stated in the third plea, like those contained in the second, show the transaction between the parties to be a mortgage, and the validity of that plea, therefore, depends on the single question, whether the plaintiff, at the time of the sheriff's sale, had such an interest in the lot as was subject to be sold on execution? We have the following statutory provision: "The personal and real estate of every individual, company, body politic or corporate, including his, her, or their goods, chattels, lands, tenements, and hereditaments, be and the same are hereby made subject to execution, &c." Rev. Stat.

1838, p. 276. An equity of redemption on a mortgage [*115] in fee is not a mere right to file a bill to redeem; *but the mortgagor has in equity, before foreclosure, an actual estate in the land, which estate he may devise, mortgage, or alien by deed. It affords a right to a husband to be tenant by the curtesy under the seisin of his wife; and it is descendible to heirs. *Casburne v. Inglis*, 2 Jacob and Walker, 194, note; 3 Preston on Abstracts, 289; 4 Kent's Comm., 159, 160. We think, therefore, that the mortgagor's estate in land mortgaged in fee, is embraced by the words *real estate* contained in the statute to which we have referred, and may be accordingly sold on an execution at law by virtue of that statute. That being the law where the mortgage is in the usual form and the debt unpaid, it follows that in the case before us, whether the notes had been paid or not before the sheriff's sale, the plaintiff's interest in the lot, though not a legal estate, was subject to the execution and sale mentioned in the plea. That the equity of redemption on a mortgage in fee, the mortgagor being in possession, may be sold on execution, is decided by the Court of Errors in *New York* on a statute similar to ours. *Waters v. Stewart*, 1 Caines' Cas. in Error, 47. It is true, the plea we are considering does not aver that the plaintiff was in possession at the time of the sale, but we do not

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conceive that circumstance to be material, no adverse possession being shown.

The declaration is objected to on the ground that it shows there was no valid consideration for the bond sued on, the consideration being a pre-existing debt. This objection is answered by a reference to the facts contained in the third plea. In showing the transaction to amount to a mortgage, the plea admits that there was a valid consideration for the bond. The defect in the declaration, therefore, though a substantial one, is cured by the express admissions of the plea. 1 Chitt. on Plead., 710.(1)

Per Curiam.—The judgment is affirmed with costs.

R. A. Chandler, for the appellant.

R. C. Gregory, for the appellee.

[*116] *(1) The following are instances of defects in declarations cured by pleading over. "In an action of debt on a bond, where the declaration specified no place at which the bond was made, it was held that a plea of duress '*apud B.*' supplied the omission in the declaration; as such a plea contained a distinct admission that the bond was made at the place where the alleged duress was. Dyer, 15 a; Com. Dig. Pleader, C, 85. In an action for slander, where the declaration averred that the plaintiff was *forsworn*, without showing how, it was determined that this defect was aided by a plea of justification, which alleged that the plaintiff, who was stated in the declaration to be a constable, had taken a *false oath at the sessions*. Cro. Car., 288; Com. Dig., *ut sup.* And again in an action of trespass for taking a hook, where the plaintiff omitted to state that it was *his* hook, or that it was in his possession; and the defendant, in his plea, justified the taking of the hook *out of the plaintiff's hand*, the Court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea. Sid., 184; Bac. Ab. Trespass, 603;" 1 Chitt. Pl., 710. *Vide*, also, *Wilson v. Merkle et al.*, post., 118.

WHITE v. FORTUNE.

APPEAL FROM JUSTICE.—In an appeal from the judgment of a justice of the peace to the Circuit Court, the cause of action filed with the justice need not be copied or referred to in the justice's transcript.

ERROR to the *Vermillion* Circuit Court.

White v. Fortune.

BLACKFORD, J.—*White* sued *Fortune* before a justice of the peace, and on the 6th of *November*, 1840, obtained a judgment. The defendant appealed to the Circuit Court, and filed an appeal-bond on the 13th of the same month. The justice, on the 27th of the same month, filed in the clerk's office the transcript, appeal-bond, cause of action, &c. The justice's transcript does not contain the cause of action, nor state that one had been filed. There was, however, a good cause of action filed in the clerk's office with the transcript. The parties appeared in the Circuit Court, and the Court, on the appellant's motion, dismissed the suit.

We see no good reason for this judgment of dismissal. It is decided, that the transcript of the record of the Circuit Court should show that a sufficient cause of action had been filed. *Bell v. Trotter*, 4 Blackf., 12. But we do not [*117] think *that the cause of action filed with the justice need be copied or referred to in the justice's transcript.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Wright, for the plaintiff.

T. A. Howard, for the defendant.

END OF NOVEMBER TERM, 1841

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA

AT INDIANAPOLIS, MAY TERM, 1842, IN THE TWENTY-SIXTH
YEAR OF THE STATE.

WILSON v. MERKLE and Others, for the Use of JENNERS.

PLEADING.—*A, B and C*, commenced a suit in a justice's Court, describing themselves as late traders under a certain firm, and filed a note executed by the defendant to the firm as their cause of action. Plea, admitting the plaintiffs to be the payees of the note, but alleging, &c. Cause transferred to the Circuit Court. *Held*, that the objection, if any, to the note as a cause of action, was cured by the admission in the plea.

SAME.—If either party in a justice's Court require proof of the execution by himself of a bond, &c., its execution must be denied on oath.

ERROR to the *Fountain* Circuit Court.

DEWEY, J.—*George Merkle, Jacob Merkle, and Francis G. Kendall*, for the use of *Jenners*, describing themselves as late traders under the firm of "*Merkle, Kendall, and Co.*," sued *Wilson* before a justice of the peace in debt; and filed as their cause of action a note executed by *Wilson*, by which he promised to pay "*Merkle, Kendall, and Co.*," &c. The defendant pleaded, that on the day of the date of the note he bought certain town lots of the plaintiffs, and executed the

[*119] *note on which the suit was founded for a part of the price of them; and that on the same day the plaintiffs

Wilson v. Merkle and Others for the Use of Jenners.

executed their bond to him, conditioned to make him a title on the payment of the purchase-money. The plea then impeached the plaintiff's title to the lots and alleged fraud. The defendant also filed the bond. The title to real estate having come in question by the plea, the justice proceeded no farther with the trial, but filed a transcript of his proceedings, together with the papers in the cause, in the Circuit Court. The defendant moved that Court to dismiss the suit for want of a sufficient cause of action, it not appearing, as he alleged, that the note filed before the justice was payable to the plaintiffs. The motion was overruled. On the trial, the defendant offered in evidence the bond purporting to be executed by the plaintiffs, which he had filed before the justice, without having proved its execution. The plaintiffs objected to its admission, and the Court rejected it. Final judgment for the plaintiffs.

There was no error, we conceive, in refusing to dismiss the suit. If the objection, that there was no sufficient cause of action, could at any time have been sustained, it was too late to make it after the filing of the special plea, and the transfer of the cause to the Circuit Court. The plea admitted that the note was payable to the plaintiffs, and undertook to avoid it by alleging that the plaintiffs had no title to the property for which it was given.(1)

But there was error in rejecting the bond offered in evidence by the defendant. There was no necessity for proving its execution under the circumstances of the case. The execution of a written contract being the foundation of the action or defense, and set out in any part of the pleadings, can be denied only on oath. R. Stat., 1838, p. 449. It is true, the statute does not expressly include causes commenced before justices of the peace, but its language is broad enough to reach them, and it contains no restraining clause. We think these causes are within the statute. There was no replication in this case, nor is a replication ordinarily required before a justice. But if either party would require proof of the execution by himself of a written instrument of the character above stated, an oath denying its execution is indispensable.(2)

Sheets v. Pabody, Administrator.

[*120] **Per Curiam*.—The judgment is reversed at the costs of the relator. Cause remanded, &c.

R. C. Gregory, for the plaintiff.

W. M. Jenners and *R. A. Chandler*, for the defendants.

(1) *Watkins v. Gregory*, *ante*, 113, and note.

(2) Rev. Stat., 1838, p. 382.

SHEETS v. PABODY, Administrator.

NOTE PAYABLE TO EXECUTOR.—If a promissory note be made payable to *A*, executor of *B*, and be delivered to *A* as such executor, the latter may sue on it in his representative capacity.

SAME.—And if *A* renounce the executorship without having sued on the note, the administrator *de bonis non* of *B* may sue on it. (a)

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—*Pabody*, as administrator *de bonis non* of the estate of *Soper*, brought an action of debt on a promissory note against *Sheets*, the maker.

The declaration is to the following effect: *Ezra Pabody*, administrator with the will annexed of the goods, &c., which were of *Henry L. Soper*, deceased, at the time of his death, left unadministered by *William Clark* as surviving executor of the last will and testament of the said *Henry L. Soper*, deceased. but who renounced the execution thereof, &c., complains of *John Sheets*, &c.; for that whereas the defendant, heretofore, to wit, on, &c., at, &c., made his promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, four years after date, to the said *William Clark*, surviving executor of the last will and testament of *Henry L. Soper*, deceased, the sum of \$587, with interest thereon from the date payable annually, value received; and then and there delivered the said promissory note to the said *William Clark*, as such surviving executor as aforesaid (the said *Clark* then and there still being such surviving executor as

(a) *Foster v. Dryfus*, 16 Ind., 158.

aforesaid, &c.); by means whereof the defendant then and there became liable to pay to the said *William Clark*, as such surviving executor as aforesaid, before his said renun-
 [*121] ciation of the *execution of the last will, &c., and since the said renunciation, and the plaintiff's appointment as administrator as aforesaid, to the plaintiff as such administrator, the said sum of money, &c. Breach, that the defendant had not paid the money to *Clark* as the executor as aforesaid or otherwise, nor to the plaintiff, &c. Profert of the letters of administration, &c.

General demurrer to the declaration and judgment for the plaintiff.

The declaration is objected to on the ground that it shows that the suit should have been brought by *Clark*, and not by the plaintiff. As the note described in the declaration was payable to *Clark*, executor of *Soper*, and is averred to have been delivered to the payee *as such executor*, we think it must be presumed, on a demurrer to the declaration, that the note was given for a debt due to the estate. Assuming the note to have been so given, the money when recovered would belong to the estate; and when that is the case, the executor may sue for it in his representative character. That point we have heretofore decided. In a suit by an administrator, the declaration contained two counts; one for goods sold and delivered and money paid by the intestate, and for money had and received for the use of the intestate, with a promise to the intestate; the other for goods sold and delivered and money paid by the plaintiff *as administrator* of the intestate, and for money had and received by the defendant for the use of the plaintiff *as such administrator*, with a promise to the plaintiff as administrator as aforesaid; and we held that there was no misjoinder. The ground of that decision is, that as the money claimed by the last count would, when recovered, be assets of the intestate's estate, it was recoverable by the administrator in his representative character, and could of course be joined with the first count. *Lowe v. Bowman*, Adm'r., November term, 1840.

There are, it is true, decisions to the contrary; one of which,

viz., *Betts, Ex'or. v. Mitchell*, 10 Mod., 316, is relied on by the defendant. We believe, however, that *Lowe v. Bowman* agrees with most of the modern authorities. In a recent case, in which it was held that counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator as administrator, it is said that [*122] *formerly the case in *Modern (Betts, Ex'or. v. Mitchell)* was an authority that such counts could not be joined, as being founded on distinct claims, the one in a personal, the other in a representative character; but that the latter cases, *Cowell v. Watts*, 6 East, 405, &c., say, whenever the money when recovered would be assets, counts in each character may be joined. *Partridge v. Court*, 5 Price, 412, affirmed in error, 7 Price, 591. The case of *Catherwood et al. v. Chabaud*, 1 B. & C., 150, is to the same effect. An excellent writer on the subject, having referred to the case last cited and others, relative to the right of an administrator to sue as such on promises made to him as administrator, says, "The principle on which these cases were decided has not been settled without conflict. Several old cases may be found, in which it was considered that the contracts made with an executor or administrator were personal to him, and that he must sue for them in his own right, and not in his representative capacity; and particularly in the instance of negotiable instruments, it was conceived until very modern times, that if an executor took a bill or note from a debtor to the estate of his testator, a new debt was thereby created which must be declared on as such. *Betts v. Mitchell*, 10 Mod., 316; *Hosier v. Ld. Arundel*, 3 Bos. & Pull, 11, in the judgment of *Chambre, J.* However, the rule may now be regarded as firmly established by the more recent cases, that wherever the money recovered will be assets, the executor may sue for it and declare in his representative character. *Cowell v. Watts*, 6 East, 405; *Thompson v. Stent*, 1 Taunt., 322; *Powley v. Newton*, 6 Taunt., 453; *Webster v. Spencer*, 3 B. & Ald., 360; *Partridge v. Court*, 5 Price, 412." 1 Will. on Ex'ors., 570.

We are entirely satisfied, therefore, that *Clark*, whilst he con-

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tinued to be executor of *Soper's* estate, could have sued on the note in question in his representative character. If he could, who has the authority now to sue on it, after *Clark* has renounced the office of executor, and *Pabody* is appointed to take his place? It would seem that there can be no difficulty in answering that question. It must be *Pabody*, the administrator of the goods and chattels, rights and credits of *Soper*, which were left unadministered by *Clark*, the executor. This point is expressly decided in a case which we have already [*123] cited, and which is very similar to the one *before us.

The Chief Justice there states, that when the cause of action is such, that the first administrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non* of the intestate; and *Bayley*, Justice, in the same case says, that if the administrator dies intestate, without having sued upon such a promise, (that is, a promise to himself when the money when recovered would be assets) the administrator *de bonis non* may sustain an action upon it; for he succeeds to all the legal rights which belonged to the administrator in his representative capacity. The other judges were of the same opinion. *Catherwood et al. v. Chabaud*, 1 B. & C., 150.

We consider, therefore, that this suit was rightly brought in the name of the administrator *de bonis non*, and that the demurrer to the declaration was correctly overruled.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

M. G. Bright, for the plaintiff.

W. Lyle, for the defendant.

WHITE v. ELKIN.

PLEADING.—It is no defense to a *scire facias* to have execution on a justice's transcript, that the defendant had and still has sufficient goods, &c. Nor is it any defense in such case, that the judgment is replevied, and that the surety had and still has sufficient goods, &c.

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PRACTICE.—The issue on the plea of *nul tiel record* must be tried by the Court, and not by a jury.

ERROR to the *Clay* Circuit Court. This was a *scire facias* in favour of *Elkin*, requiring the defendant to show cause why execution should not issue on the transcript of a justice's judgment, &c.

SULLIVAN, J.—*Scire facias* to sell real estate. Pleas, 1, *Nul tiel record*; 2, That the defendant was, &c., and still is, the owner of goods and chattels sufficient to pay said judgment; 3, That the judgment was replevied on the docket of the justice, and that the surety of the defendant then [*124] was and *always had been possessed in his own right of sufficient goods and chattels to pay the judgment, &c.; but that no proceedings had been instituted against him, &c. There were two other pleas on which issues were made and found for the plaintiff. To the first plea the plaintiff replied, that there was such a record as that set forth in the *scire facias*. This issue was also tried by a jury and a verdict found for the plaintiff. Demurrers to the second and third pleas sustained, and final judgment for the plaintiff.

No question arises on the fourth and fifth pleas. The demurrers to the second and third pleas were correctly sustained by the Court. The facts set forth in the second plea constitute no defense to the plaintiff's action, as this Court has heretofore decided.(1) The third plea is no bar to the plaintiff's action. On the return of *nulla bona* to the execution issued by the justice, the plaintiff, if he had chosen that remedy, might have proceeded by *scire facias* against the bail, but he was not bound to do so. He was at liberty, if he preferred it, to continue to seek his remedy against the principal, and adopt the course here pursued. If he is unsuccessful, the surety will still be liable.

There is an error in the proceedings, however, for which the judgment must be reversed. The issue of *nul tiel record* was tried by a jury. It was the province of the Court and not of the jury to try that issue. Until the question raised by that

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plea is determined by the Court, the case remains undecided. *Barker v. McClure*, 2 Blackf., 14.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick, for the plaintiff.

A. Kinney and S. B. Gookins, for the defendant.

(1) *Hamilton v. Matlock*, Nov. term, 1840; *Burger v. Becket*, *Ants*, p. 61; *Bemington v. Henry*, *Ante*, p. 63.

[*125] *ALDRICH, Supervisor, &c., v. HAWKINS and Another.

JURISDICTION—OBSTRUCTING HIGHWAY.—The Circuit Court has not original jurisdiction to enforce the daily penalties incurred by suffering obstructions to remain in highways.

SAME.—Such penalties can only be sued for before justices of the peace.

SAME.—If a statute create a new offense or cause of action, and provide that a particular tribunal shall take cognizance of it, no other court can enforce the law.

ERROR to the Warren Circuit Court.

DEWEY, J.—*Aldrich*, supervisor of a certain road district in the county of Warren, sued *Hawkins* and *Parker* in debt in the Circuit Court. The declaration alleges, that the defendants unnecessarily obstructed a certain public highway; for which the plaintiff, as supervisor, prosecuted them before a justice of the peace, and caused them to be convicted and fined; and that ever since the conviction to the time of bringing this suit, and for the space of one hundred and twenty days, they had suffered the obstruction to remain to the hinderance of travelers; whereby they had forfeited \$1.00 for each day during which such obstruction was permitted to continue, amounting in all to \$120. The defendants moved the Court to dismiss the action. The motion was granted and the cause dismissed. The plaintiff prosecutes this writ of error.

The question here raised is one which goes to the jurisdiction of the Circuit Court over the subject-matter of the declaration.

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By a statute passed in 1824, and continued in force through the several revisions of our laws, it is enacted that if any person, who may have been fined by a justice of the peace for unnecessarily obstructing a road, shall suffer such obstruction to remain, he shall forfeit \$1.00 for each day of its continuance, to be recovered by the proper supervisor of roads in an action before a justice of the peace. Stat., 1824, p. 364; Rev. Stat., 1838, p. 498.

It is contended by the plaintiff in error, that the Circuit Court, by virtue of its general jurisdiction, can entertain an original suit founded on this statute, the statute itself containing no restraining clause.

It is in general true, that a superior court of general powers can not be divested of any portion of its jurisdiction [*126] *but by the express words or necessary implication of a statute. *Cates v. Knight*, 3 T. R., 442; *Shipman v. Henbest*, 4 Ib., 109. But the case before us does not come within this rule. The Circuit Court never had original jurisdiction over the forfeiture incurred by the statute. The act created a new offense or cause of action, and designated a particular tribunal which should take cognizance of it. In such instances, the provisions of a statute must be strictly followed; and no Court, other than that on which the new jurisdiction is conferred, can enforce the law.

It has been argued, that this view of the subject will defeat the ends of justice, because the aggregate of the penalties for which this suit is brought exceeding in amount the jurisdiction of a justice of the peace, if the supervisor can not sue in the Circuit Court, no suit at all will lie, and thus the law will have been violated with impunity.

If such were the consequence of suffering the daily penalties incurred by a violation of the statute to accumulate as in this case, the evil should be attributed to the neglect of the supervisor to bring suit before the proper tribunal in due season, and not to the construction which we have given to the statute. But there is another answer to this argument. A penalty of \$1.00 for every day during the continuance of the obstruction

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of the highway is incurred. We do not perceive the difficulty of portioning the penalties in several suits so as to give the justice jurisdiction in each, although all the penalties amount to a sum over which he has no cognizance.

We think the Circuit Court had not original jurisdiction in the case, and that the action was correctly dismissed.

Per Curiam.—The judgment is affirmed with costs.

W. M. Jenners and R. A. Chandler, for the plaintiff.

Z. Baird, for the defendants.

[*127] *BISHOP and Others v. YEAZLE, Administrator.

DUE DILIGENCE—WANT OF, AGAINST MAKER OF NOTE.—An assignee of a promissory note obtained judgment in time against the maker, and, after a delay of more than six months, took out a *feri facias* on the judgment. The execution was returned *nulla bona*. Held, that the delay in issuing the execution, unexplained by the assignee, discharged the assignor from his liability on the assignment.(a)

PRACTICE.—If a declaration contain one good count, a demurrer to the whole declaration can not be sustained.

APPEAL from the *Fountain* Circuit Court.

SULLIVAN, J.—Assumpsit by the assignees against the administrator of the assignor of a promissory note. The declaration contains two counts. The first is special, the second is for money had and received. The first count avers the making of a promissory note by *Cheadle* and *Hand* to *Lewellan*, the defendant's intestate, and the assignment of it by *Lewellan* to the plaintiffs; that a suit was commenced by the assignees against the makers, and judgment obtained against *Hand* at the *March* term, 1839, of the *Vermillion* Circuit Court, being the first term after the assignment, and a return made of "not found" as to *Cheadle*. The declaration contains an averment also, that *Cheadle* "had left the country" before the note was assigned. The declaration then states that on the fourth of

(a) 2 Ind., 507; 3 Id., 296.

October, 1839; a *fi. fa.* was issued against the goods and chattels, &c., of *Hand*, which was duly returned *nulla bona*. There was a general demurrer to the declaration, and judgment for the defendant.

The objection made to the first count is, that it appears from the averments contained in it, that the plaintiffs did not use legal diligence to recover the money from the makers of the note. If this be the fact, and a sufficient excuse be not shown for it, the decisions of this Court heretofore made, settle the point that the plaintiffs can not recover. In the case of *Hanna v. Pegg*, 1 Blackf., 181, which was a suit by the assignee against the assignor of a note like the one in the case before us, not negotiable by the law-merchant, it was said that it might be laid down as a general rule, that it was the duty of the assignee to bring suit against the maker of a note or bond, and proceed in the ordinary course of law for the collection [*128] of the debt, except in cases of notorious *insolvency, or where some other reason equally strong existed for dispensing with a suit.

In the case under consideration, suit was brought against the makers of the note, and judgment obtained against one of them, *Hand*, at the first term of the Court after the note was assigned, but execution was not issued against him until more than six months after the rendition of the judgment. The defendant insists that the plaintiffs have not shown a sufficient excuse for not pursuing *Cheadle* to insolvency, and that the delay in issuing execution against *Hand* was gross negligence. Without deciding at present whether the plaintiffs have excused themselves for not prosecuting *Cheadle* to insolvency, we will turn our attention to the delay in issuing execution on the judgment against *Hand*.

It is said that the assignee of a note, in seeking to recover the amount from the maker, is not bound to run a race against time. This is true, yet he is required to use reasonable diligence in commencing a suit, prosecuting it to final judgment, and in issuing the necessary compulsory process to enforce the collection of the judgment. In regard to the commencement

of a suit, it was decided in *Merriman v. Maple*, 2 Blackf., 350, that a delay of thirty-two days, without a reason to justify or excuse it, was not consistent with the diligence that the law requires. In that case the writ was returned *non est inventus*, and it was the return that made it necessary for the plaintiff to show that an earlier proceeding against the maker of the note would have been impracticable or unavailing. Unexplained, it was evidence of a want of legal diligence.

The same may be said, with equal force at least, of delay in issuing execution. The object of a judgment is to obtain execution, and if the writ be deferred a long time after judgment, and then prove unavailing, it is the duty of the plaintiff to excuse the delay. This point has never been directly decided by this Court, but its analogy to the points that have been decided is obvious. In *Kentucky*, where a statute similar in many respects to our statute exists, it has been decided in a suit between the assignee and the assignor, that a delay to issue execution until four months after judgment was unreasonable, and

that it was conclusive against the assignee's right to [*129] recover. The Court said in that case, that the time *lost was more than any prudent man would have indulged in when he believed his debt to be in danger, and savoured too strongly of indulgence graciously given by some understanding between the parties. *Trimble v. Webb*, 1 Monroe, 100. To the same effect is the case of *Smith v. Blunt*, 2 Marsh, 522. In considering the statute of *Kentucky*, and the construction given to it by the Courts of that State, the Supreme Court of the *United States* have said, that "after judgment there must be the same diligence in pursuing the debtor's property by execution as in the commencement of the suit." *Bank of U States v. Tyler*, 4 Pet., 366, 381.

By our statute, the personal property of a debtor is bound only from the time that execution is delivered to the officer. The judgment creates no lien upon it. A delay, therefore, to issue execution enables a debtor to dispose of his personal property, the possibility of which is a reason why execution should be regularly issued.

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Our conclusion is, that an assignee who delays execution against the original debtor, as was done in this case, for a period of more than six months after judgment, without accounting for the delay, is guilty of unwarrantable negligence, and has no recourse upon the assignor. The first count in the declaration therefore is bad.

The second count is a common count for money had and received, and is unobjectionable. As there is one good count in the declaration, the Court erred in sustaining the demurrer. 3 Blackf., 167.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Chandler, for the appellants.

R. C. Gregory, for the appellee.

CROSS v. WATSON and Another.

PLEADING.—If a plea profess to answer only a part of the cause of action, it can be considered as an answer only to that part, though it contain a legal defense to the whole declaration.

[*130] **SAME—PRACTICE**.—*And in case of such plea, the plaintiff may, before he replies to the plea, or afterwards during the term at which the plea was filed, take judgment by *nil dicit* for the part not mentioned in the beginning of the plea.

ERROR to the *Noble* Circuit Court.

BLACKFORD, J.—*Watson* and another brought an action of debt against *Cross* on a judgment of a Court of record in the State of *Michigan*. The judgment on which the suit was founded is for \$2,054.58.

Plea as follows: "The defendant says nothing as to the plaintiff's cause of action, as to \$1,054.58 parcel of the said sum of \$2,054.58 in the declaration demanded. And as to the

residue of the said sum of \$2,054.58, viz., \$1,000, the defendant files his plea of payment in these words: *Cross ats. Watson and Ingraham.* And the defendant comes and defends, &c., and as to \$1,000 of said sum of money above demanded says *actio non*, because he says that after the rendition of the said judgment in the declaration mentioned, and before the commencement of this suit, viz., on, &c., he fully paid and satisfied the plaintiffs the full amount of the said sum of money above demanded, viz., at, &c., and this he is ready to verify, &c.”

Replication. The plaintiffs say *precludi non*, because they say that the defendant did not fully pay and satisfy them the said sum of money in the plea specified, viz., \$1,000, in manner and form as in the plea alleged; and this they pray may be inquired of by the country. To this replication, the defendant added the *similiter*.

The issue was submitted to the Court without a jury. Judgment as follows: It is considered that the plaintiffs have and recover of and against the defendant the sum of \$1,054.58, parcel of the said sum of \$2,054.58 in the declaration demanded, and also the further sum of \$1,000, remaining part of said sum of \$2,054.58, making in all the sum of \$2,054.58, in debt, besides their costs and charges in this behalf laid out and expended.

As the plea professes to answer only a part of the cause of action, it could be considered as an answer only to that part, though it might, in reality, contain a legal defense to the whole declaration. Archbold's Civil Pleading, 168. The plaintiffs, therefore, did right in this case, whether the matter [*131] *pleaded be in bar of the whole suit or not, to treat the plea as only an answer to so much of the demand as it professed to answer. They might, before they replied to the plea, have taken the judgment by *nil dicit* to which they were entitled; but as that judgment was rendered during the term at which the plea was pleaded, it was entered in time. 1 Will. Saund., 28, note *h*.(1)

There is no objection made to the other part of the judgment.

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Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

C. W. Ewing and *R. Brackenridge*, for the plaintiff.

W. M. Jenners and *J. B. Howe*, for the defendants.

(1) *Vide Fitch v. Polke*, Vol. 5 of these Rep., 86, and note.

HAMILTON v. MITCHELL.

CHATTEL MORTGAGE.—A mortgage of personal property may be acknowledged or proved before the recorder of the county.

SAME—RIGHT OF PROPERTY.—*A* mortgaged certain goods to *B*, but was to continue in possession of them, by the terms of the contract, for a definite time. An execution against *A* in favour of a third person was afterwards levied on the same goods in *A*'s possession; and *B* filed a claim to them under the statute regulating the trial of the right of property, but the time for which *A* was to possess the goods had not expired when the claim was filed. *Held*, that the claim could not be sustained, the claimant not having a right to the immediate possession of the goods. (a)

ERROR to the *Wayne Circuit Court*.

BLACKFORD, J.—An execution was issued by a justice of the peace in favour of *Hamilton* against one *Thomas*, and was levied upon a carpet, table, &c., found in the possession of the execution-debtor. Afterwards, viz., in *November, 1840*, *Mitchell* filed with the justice an affidavit, setting out that he was the owner of the goods by virtue of a certain mortgage, &c., and claimed the property. The right of property was tried before the justice by a jury, and a verdict and judgment rendered for the defendant. The plaintiff appealed.

On the trial in the *Circuit Court*, the plaintiff offered [132] in evidence a mortgage in his favour on the goods, proved to have been executed to him by *Thomas* on the 31st of *October, 1840*, and before the execution under which they had been taken was issued. The mortgage was given to secure the payment of a *bona fide* debt of \$299, which was to

(a) *Philbrick v. Goodwin*, 7 Blackf., 18.

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be paid on the 6th of *November*, 1841. If the money should not be paid when due, the mortgagee was authorized to take possession of the goods, sell them, and, after satisfying the mortgage-debt, pay the overplus to the mortgagor. The goods were to remain in the mortgagor's possession until he should make default in the payment of the debt. The mortgage was proved before the recorder of the county on the 12th of *November*, 1840, and was recorded on the same day.

The admission of the mortgage as evidence was objected to, but the objection was overruled. There was no evidence in the cause except the mortgage. The Circuit Court gave judgment for the plaintiff.

One question in this cause is, whether the mortgage was admissible as evidence? It is objected to on the ground that the recorder had no authority to take the proof of it. The statute requires such mortgages to be acknowledged or proved, and recorded within a certain time; but it does not say before whom the acknowledgment of proof shall be taken. Rev. Stat., 1838, p. 470. We think that, under these circumstances, the proof could be made before the recorder, who had, when the statute just mentioned was passed, and who still has, authority to take the acknowledgment and proof of other deeds required to be recorded. Rev. Stat., 1838, p. 312. Whether the mortgage, in this case, would have been admissible evidence without its having been acknowledged or proved and recorded, it is not necessary now to examine.

There is another question in the cause, viz., whether the plaintiff, by virtue of the mortgage, could sustain the claim filed? To sustain it, he must not only show the property to be his, but also that he was entitled to its immediate possession when he filed his claim; because a judgment in his favour gives him the possession.

The mortgagor, who is the execution-defendant, was in possession of the goods at the date of the mortgage, and had, by the express terms of the contract, a right to possess them for nearly a year after the levy was made and the claim [*133] filed. *The plaintiff, therefore, who is the mortgagee,

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could have no right to the possession of the goods when he filed the claim, unless the levy of the execution gave him such right. But it is impossible to suppose that the levy could produce that effect. If the property was liable to the execution, the purchaser at the sheriff's sale would have the same interest in it which the mortgagor previously had; and if it was not so liable, the injury occasioned by the levy would be a cause of action for the mortgagor, who would be answerable for the goods to the mortgagee, at the expiration of the term, if the debt were not then paid. In no event could the mortgagee claim possession of the goods from the mortgagor or from any other person, until the time had elapsed for which, under the contract, the mortgagor was to possess them.

This is similar to the case where goods are leased for a definite period, and they are sold, during the term, on an execution against the tenant. In such case, the lessor can neither support trespass for taking the goods, nor trover for their conversion, supposing them not subject to the execution. The reason is, that he has no right to the immediate possession of the goods. *Gordon v. Harper*, 7 T. R., 9.

In the case before us, the plaintiff avers the goods levied on to be his, and should he recover, they must, according to the statute, be delivered over to him; and he exhibits a mortgage as the foundation of his suit. But that mortgage itself shows he had no right to the possession of the goods when he filed his claim. The consequence is, the suit must fail.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

C. B. Smith, for the defendant.

 LIVINGSTON and Another v. THE INDIANAPOLIS INSURANCE COMPANY.

USURY.—A plea of usury, not specifying the particulars of the contract, &c., is bad on special demurrer.

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[*134] SAME.—*Usury, as an indictable offense under the statute of 1833, consists in the taking or receiving unlawful interest, and not in merely contracting for such interest.

SAME —But still a party to such contract is not bound to testify as to its existence, if he declare on oath that his testimony will criminate himself; because the establishment of the contract, should he be afterwards indicted for receiving the usurious interest, might have a tendency to convict him.

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—The *Indianapolis Insurance Company* brought a joint suit against *Livingston* the maker, and *Jamison* the indorser, of a promissory note payable and negotiable at the Branch Bank at *Indianapolis*. The declaration also contains the common money counts. Pleas, usury in general terms to the first count; and the general issue to the whole declaration. Special demurrer to the plea of usury sustained. Judgment for the plaintiffs.

The action is founded on the statute which authorizes joint suits against the makers and indorsers of negotiable notes. Stat., 1839, p. 38.

The plea of usury being couched in general language, not specifying the particulars of the contract, was correctly overruled on the special demurrer.

On the trial of the cause, the plaintiffs having given in evidence the note described in the first count of the declaration, the defendants introduced a witness, and proposed to prove by him, that the note in question had been given by *Livingston* to the plaintiffs on a usurious contract, and that the illegal interest was included in the sum of money promised to be paid by the note. The witness, after stating on oath, that he was a member of the *Indianapolis Insurance Company*, their secretary and agent, and that he had personally transacted the business which gave rise to the note, claimed that he was privileged from making the disclosure sought of him, on the ground that in his belief it had a tendency to criminate himself. The Court sustained his claim of privilege, and excused him from testifying.

The appellants contend, that by the statute regulating interest on money, the *crime* of usury consists in the actual

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taking or receiving illegal interest; and that, therefore, the Circuit Court erred in exempting the witness from [*135] giving *testimony, having for its object the establishment of only the usurious contract.

We admit the premises of the appellants, but we do not concur in their conclusion. The statute alluded to fixes the rate of interest at six *per centum per annum*, unless a higher rate not exceeding ten *per cent.* be agreed upon in writing; and it forbids all persons and corporations to “take or receive,” directly or indirectly, more than the specified rates. It then enacts: “If any person, either directly or indirectly, shall demand or receive any greater rate of interest than shall be lawful,” he shall on conviction by indictment be fined, &c., “in double the amount of the excess of interest so received above the amount by law allowed.” R. Stat., 1838, p. 336. As the penalty for a violation of this law is made to depend entirely on the amount of unlawful interest actually received, it is impossible to conceive that the Legislature designed to make the crime consist in the mere contract for or demand of usury. The ambiguity of expression was probably occasioned by the inadvertent use of the word “demand,” in the penal part of the statute, in the place of “take” which is repeatedly and invariably used in connection with receive in the preceding passages.

It does not, however, follow from this construction of the statute, that the witness was bound to give evidence showing that the contract in question was usurious. No man is bound to criminate himself, or to give evidence of facts tending to prove him guilty of a crime. A witness is not compellable to give an answer which would, at once, disclose his guilt; nor is he obliged to answer to any fact which *might* form a link in the chain of evidence necessary to his conviction. It is the province of the Court, in the first instance, to judge whether the answer may criminate, or tend to criminate him; and if it be of that character, it is the right of the witness, who alone knows what his answer will be, to judge what will be the consequence of answering; and if he declare, under oath, that the answer will criminate him, or have that tendency, he may refuse to

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testify. 1 Stark. Ev., 135; 3 Ib., 1740; *Cates v. Hardacre*, 3 Taunt., 424; 1 Burr's Trial, 245; *East India Co. v. Campbell*, 1 Ves. sem., 246; Cooper's Eq. Pl., 204; Story's Eq. Pl., 423.

In the case presented by the record, if any usurious [*136] *contract existed, the witness was knowingly a party to it. It is evident that such a contract *might* form a step in a prosecution against him for usury. Whether an offense was consummated by the actual reception of unlawful interest is not disclosed. Such might have been the fact; and the witness, knowing the truth, might well conceive that the establishment of the contract on which the usury was received would tend to his conviction, should he be prosecuted criminally. The Circuit Court committed no error in excusing the witness from testifying as to the existence of the usurious contract.

Per Curiam.—The judgment is affirmed with costs.

C. Fletcher, O. Butler, and S. Yandes, for the appellants.

P. Sweetser, for the appellees.

HUME v. TUFTS.

TRESPASS.—To maintain trespass *de bonis asportatis*, the plaintiff must have had, at the time of the trespass, the actual or constructive possession of the goods, or, at least, a general or special property in them, and a right to the immediate possession.

ERROR to the *Dearborn* Circuit Court.

DEWEY, J.—Trespass *de bonis asportatis* by *Tufts* against *Hume*. Pleas, 1, The general issue; 2, Justification under certain executions against one *Jackson* directed to the defendant as a constable, by virtue of which, he seized the goods and chattels named in the declaration as the property of *Jackson*; and that the property so seized was *Jackson's* and not the plaintiff's. Replication, alleging the property to be in the plaintiff and not in *Jackson*; upon which there was an issue joined. Verdict and judgment for the plaintiff.

Hume v. Tufts.

It appeared in evidence that *Tufts*, being the general owner of the property in question, had leased it to *Jackson* for one year, or until demanded, for which *Jackson* was to pay a stipulated price per month. Before the expiration of the year, and without any demand having been made by *Tufts* on *Jackson* for the property, (the latter still being in possession), the [*137] defendant seized it on the executions named *in his plea, and sold it at public auction. The Circuit Court instructed the jury that, under those circumstances, the plaintiff was entitled to support his action.

The propriety of this instruction is the question for our consideration.

To maintain trespass, it is essential that the plaintiff should have been in the actual or constructive possession of the property at the time the injury was committed; *Smith v. Milles*, 1 T. R., 480; *Ward v. Macauley*, 4 T. R., 489; or, at least, he must have had a general or special property in the goods in controversy, and a right to the immediate possession of them. *Chinn v. Russell*, 2 Blackf., 172, and note 3.

We do not think that the facts of this case bring the plaintiff within this rule. When the defendant levied the executions against *Jackson* upon the goods, the latter had, under his lease, a special property in, and the actual and rightful possession of them. The lease had not expired by the lapse of time, nor had it been terminated by a demand of the leased property. It is true that *Tufts*, the general owner, could, by a demand of the goods, have extinguished the special property of *Jackson*, and have entitled himself to the immediate possession; but not having taken that step, he could have maintained neither trover nor replevin against *Jackson*. His right was merely reversionary; for an injury to such a right, trespass was not the appropriate remedy. We think, therefore, that the instruction of the Circuit Court that the plaintiff could maintain the action, was wrong.

There is another point made by the record respecting the qualification of a juror, which it is now unnecessary to consider.

Kain v. Gradon.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Dumont and *P. L. Spooner*, for the plaintiff.

G. H. Dunn, for the defendant.

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*KAIN v. GRADON.

APPEAL FROM JUSTICE'S JUDGMENT—PARTIES.—If from the judgment of a justice of the peace against several defendants, some of them appeal to the Circuit Court in their own names without joining the others, the appeal should be dismissed on motion.(a)

SAME.—The appeal from such judgment should be taken in the names of all the defendants who are living and are aggrieved by the judgment; and if any of those in whose names the appeal is taken, afterwards refuse to unite with the others in its prosecution, they should be summoned and severed.

ERROR to the *Noble* Circuit Court.

SULLIVAN, J.—*Kain* sued *Gradon* and *Sawyer* before a justice of the peace and recovered judgment against them. One of the defendants, *Gradon*, prayed an appeal to the Circuit Court which was granted to him. In the Circuit Court, the plaintiff moved to dismiss the appeal because it was taken by one of the defendants only. The motion was accompanied by an affidavit stating that *Sawyer* was living and resided in the neighborhood. The Court overruled the motion, proceeded to try the cause, and gave judgment for the defendants.

The Circuit Court erred in overruling the motion to dismiss the appeal. There is no reason why appeals from the judgment of a justice, should be distinguished from writs of error, and in cases of the latter description it is settled by repeated adjudications, that on a judgment against several defendants, a writ of error must be brought in all their names, if they are still living and aggrieved by the judgment. *Cro. Eliz.*, 648; *Ib.*, 892; 1 *Strange*, 233; *Ib.*, 606; 3 *Burr.*, 1789. If it were not so, every defendant might bring a writ of error or take an appeal by himself, and by that means prevent the plaintiff

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from having the benefit of his judgment, though it might be affirmed once or oftener. 2 Tidd's Pr., 1054.

Where all the plaintiffs or defendants to a suit do not wish to prosecute an appeal or a writ of error, or will not unite in doing so, any one of them may take an appeal or sue out a writ in the names of all, and if the others refuse to come in and join with him in the assignment of errors, there must be a judgment of severance as to them, after which he may proceed in his name alone. 6 Bac. Abr., "Summons and Severance," E; 1 Archbold's Pr., 232.

In the case before us, it was the privilege of either [*139] of the defendants to appeal from the judgment of the justice, and to have had judgment of severance in the Circuit Court. As *Graddon* did not pursue that course, his appeal should have been dismissed.

Per Curiam.—The judgment is reversed, &c., with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

W. H. Coombs, for the defendant.

FANCHER and Others v. INGRAHAM and Others.

REVIVOR—PLEADING.—A bill of revivor and supplement stated who were the parties to the original bill, its object, the proceedings on it, and the abatement—showed the plaintiff's right to revive—charged that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor, as it was in with respect to the parties to the original bill when the abatement happened—and prayed that the suit might be revived, &c. The supplemental matter then followed.

Held, that that part of the bill which sought to revive the original suit was valid, and, therefore, whether the subsequent part was good or not, a demurrer to the whole bill could not be sustained.

ERROR to the *Tippecanoe* Circuit Court.

SULLIVAN, J.—This was a bill of revivor and supplement filed by the complainants as the heirs of *Samuel Fancher*, de-

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ceased, against *Ingraham* and others, defendants to the original bill, and one *Ezra Bush*. The bill states that [*140] **Fancher* on, &c., filed an original bill in the *Tippecanoe* Circuit Court against all the defendants to the present bill except *Ezra Bush*, and that by said bill he prayed that he might be let in to redeem the land in said bill mentioned; that defendants, or such of them as had the legal title to said land, might be required to convey to him, &c. The bill further states, that all the defendants to the original bill answered except *Samuel Hanna*; that previous to any decree being rendered, *Fancher* died intestate leaving the complainants his heirs at law, and who rightfully inherited the land described in the bill. It then states by way of supplement to the original bill, that *Ezra Bush* claims title to a part of the land mentioned in the bill, derived by purchase from *Ingraham* or "from some of the parties to said bill;" that the purchase was fraudulent, &c.; and prays that *Bush* may be made a defendant; that the deed to him may be set aside, &c.

The defendants demurred to the bill. The demurrer was sustained and the bill dismissed.

The bill in this case, being a compound of the two species of bills of revivor and of supplement, should be framed in its several parts according to the frame of those bills respectively. *Mitf. Eq. Pl.*, 80. That part of this bill which seeks to revive the original suit, contains all that is necessary in such bill. It states who were the parties to the original bill, its object, the several proceedings thereon, and the abatement. It shows how the present plaintiffs become entitled to revive, and charges that the cause ought to be revived, and to stand in the same condition with respect to the parties in the bill of revivor, as it was in with respect to the parties in the original bill at the time the abatement happened. It prays that the suit may be accordingly revived, and that the defendants may answer. *Cooper's Eq. Pl.*, 70; *Story's Eq. Pl.*, 300; *Ib.*, 480, note 4. To this part of the bill, therefore, the demurrer was not well taken.

By the supplemental part of the bill, *Ezra Bush* is sought

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to be made a defendant to the proceedings, but no reason is assigned why he was not made a party to the original bill by amendment or otherwise. It is not shown whether his interest arose before or after the original bill was filed; whether it arose before the death of *Samuel Fancher* or since. It may be that if the demurrer had been confined to this [*141] part of the bill, it would have been allowed. *Baldwin v. Mackown*, 3 Atk., 817; *Story's Eq. Pl.*, 268 *et seq.* But in deciding the question presented by the record, it matters not whether the bill be defective in the part referred to or not. We have already said that that part of the bill which seeks to revive the original suit is sufficient, and as the demurrer is to the whole bill, the question is whether it should have been sustained, even admitting the supplemental part to be defective.

The rule is, that where a demurrer goes to the whole bill, it must be good as to all, or it is good for nothing. *Mayor, &c. of London v. Levy*, 8 Ves., 403; *Earl of Suffolk v. Green et al.*, 1 Atk., 450; 2 Ib., 388; 5 Ves., 173. That is if there be any part of the bill sought to be covered by the demurrer to which it does not extend, the whole demurrer must be overruled. *Higinbotham v. Burnet et al.*, 5 Johns. C. R., 184. This rule does not prevent a defendant from putting in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes. *Mitf. Eq. Pl.*, 214. That course, however, has not been pursued in the present case, but as before remarked, the demurrer is to the whole bill, and as there is a part of the bill to which the demurrer is not well taken, the whole should have been overruled.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

W. M. Jenners, for the plaintiffs.

J. Pettit, for the defendants.

Richardson and Another v. B. Adkins.

RICHARDSON and Another v. B. ADKINS.

REPLEVIN—PRACTICE.—Replevin against two persons, who pleaded the general issue. One of them also justified as sheriff under an attachment against a stranger, to whom he alleged the goods belonged, and pleaded three other pleas of property in persons other than the plaintiff. Replications traversing the last three pleas, the first special plea not being noticed. Verdict that the right of property was in the plaintiff, and judgment in his favour. *Held*, that the judgment was erroneous, because the jury had not found for the plaintiff on the general issue, and because the first special plea remained undisposed of.

[*142] *ERROR to the *Decatur* Circuit Court.

DEWEY, J.—*Adkins* sued *Richardson* and *Hibbetts* in replevin. The defendants pleaded jointly, that they did not take and detain the property. *Richardson* pleaded separately, 1, A justification under a domestic attachment directed to him as sheriff, by which he seized the goods in dispute as the property of one *W. Adkins*, the defendant in attachment, to whom they belonged, alleging they were not the property of the plaintiff; 2, Property in *W. Adkins*; 3, Property in *Hibbetts*, the other defendant; and 4, Property in *Richardson* and *Hibbetts*. The plaintiff moved the Court to reject the first plea pleaded by *Richardson* alone. The motion was never decided. Replication to the three last pleas, alleging the property to be in the plaintiff. In this state of the pleadings, the cause went to the jury in such a manner as to leave it uncertain what issues were really submitted to them. A verdict was returned "We of the jury find the right of property to be in the plaintiff and assess his damages at one cent," upon which the Court rendered a judgment against both defendants.

This judgment must be reversed. The issue formed upon the joint plea of both defendants, that they did not take, &c. was not found at all by the jury. The finding that the right of property was in the plaintiff did not authorize a judgment in his favour over the general issue. *Huff v. Gilbert*, 4 Blackf., 19.

There is also another objection to the judgment. The plea

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of one of the defendants, *Richardson*, justifying under a domestic attachment, stands unanswered. The verdict did not entitle the plaintiff to a judgment against both defendants over that plea. There was so much informality in the whole trial of the cause, that a *venire de novo* must go as to all the issues.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. J. Peaslee, for the plaintiffs.

P. Sweetser, for the defendant.

[*143] *RAWLEY v. DOE, on the Demise of BEACHAMP and Wife.

EJECTMENT.—If the consent rule in ejectment require the defendant to confess on the trial the possession of the premises, as well as the lease, entry, and ouster, it is evidence of such possession as well as of the lease, &c.

SECONDARY EVIDENCE.—If the defendant in ejectment refuse to produce on the trial a patent from the *United States* to the plaintiff's lessor for the land in controversy, the patent being in the defendant's possession, and due notice having been given him to produce it, secondary evidence of the contents of the patent would be admissible, without proof of the execution of the original, were proof of its execution otherwise necessary.

SAME.—But extrinsic proof of the execution of such patent is in no case necessary in the first instance.

SAME.—In case of the defendant's refusal as aforesaid to produce the patent a copy, whether in the record book of the county or not, proved by a witness on the trial to be a true copy, or a certified copy from the records of the general land office, may be given in evidence.

APPEAL from the *Clay* Circuit Court.

BLACKFORD, J.—This was an action of ejectment brought by the lessee of *Purden Beachamp* and *Minerva* his wife, formerly *Minerva Bundy*, against the appellant for a tract of land in *Clay* county. Plea, not guilty. The cause was submitted to the Court, and judgment rendered for the plaintiff.

One of the witnesses on the trial, in support of the suit, stated that three or four months before the trial, he saw in the defendant's possession a patent to the said *Minerva* for the land

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described in the declaration; that he, the witness, had the patent in his hands and read it, and gave it back to the defendant. It was further proved, that the plaintiff had given a regular notice in writing to the defendant, a reasonable time before the trial, to produce at the trial the said patent to *Minerva Bundy*, one of the lessors, and now the wife of the other lessor, for the land in controversy.

The defendant having refused to produce the patent at the trial, the plaintiff undertook to prove the contents. He offered to introduce the county record book of deeds in which the patent was recorded, and to read the record of the patent. He proved by the recorder, that three or four years before the trial, an instrument purporting to be a patent from the *United States* to the said *Minerva Bundy*, was handed to him, the witness, to be recorded preparatory to drawing [*144] *money from the sinking fund by the said *Minerva* or the defendant, (both being present); that the said copy was truly taken from the instrument handed to him, which was attested by the seal of the *United States*; and that the said copy on the record book was as follows: (The copy, showing the patent to be in the usual form, is here set out in the transcript.) This copy of the patent in the record book, sworn to on the trial as correct by the recorder, was objected to as evidence by the defendant; but the objection was overruled, and the evidence admitted.

The plaintiff proved that the land mentioned in the copy of the patent was the land described in the declaration; and that the said *Minerva*, one of the lessors, was the same person who is named in the patent, and that she was married to *Beachamp*, the other lessor. It was also proved by the witness who had proved the patent to be in the defendant's possession, and who was again examined, that the copy in the record book was a true copy of the patent which he had read.

The consent rule required the defendant to confess on the trial the possession of the premises, as well as the lease, entry, and ouster: and it was therefore evidence of such possession as well as of the lease, &c.(1)

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This was all the evidence in the cause. The ground relied on for a reversal of this judgment is, that the copy of the patent was not legal evidence; but we do not think the objection sustainable. The original patent was in the defendant's possession, and he refused, after regular notice, to produce it at the trial. That refusal would have excused the plaintiff from proving the execution of the patent, had he been otherwise required to do so. 1 Phill. Ev., 452. But extrinsic proof of the execution of such patent is in no case necessary in the first instance. *Bowser et al. v. Warren*, 4 Blackf., 522. The plaintiff had a right, under the circumstances, to prove the contents of the patent by secondary evidence. He offered a copy in evidence, and proved it to be correct by the person who made it. There could be no better secondary evidence of the contents of the patent. The defendant says that a certified copy from the records of the general land office should have been procured; but we do not think so. Such a copy would be admissible, *Smith v. Mosier*, 5 Blackf., 51, but it could not be better than [*145] the *other. It would be only a certified copy of a copy, whilst the one before us is proved by a witness in the cause to be a true copy of the original.

Whether the circumstance adverted to by the plaintiff, that the copy was read from the record book of the county, makes any difference, we have not examined. For the admissibility of the copy as evidence of the contents of the patent, we rely on the fact, that it was proved to be a true copy of the original, by a witness examined in the cause.

Per Curiam.—The judgment is affirmed with costs.

A. Kinney and *S. B. Gookins*, for the appellant.

C. P. Hester, for the appellee.

(1) Notwithstanding the terms of the consent rule, it was formerly holden necessary to prove the defendant in possession of the premises in dispute, and plaintiffs were frequently nonsuited on subtle points arising out of this practice, quite independent of the merits of the case. But by recent orders of the different Courts, the consent rule has been altered, so as to include the confession of possession, as well as of lease, entry, and ouster, and no proof of possession is now required beyond the possession of the rule. *Adams on Eject*, 276.

Barton v. Osborn.

BARTON v. OSBORN.

FORCIBLE DETAINER—APPEAL.—A writ of error lies to a judgment of the Circuit Court, on appeal from the judgment of two justices of the peace, in a case of forcible detainer.

SAME.—To sustain a case of forcible detainer, there must be proof that the premises are unlawfully detained by force and violence.

SAME.—The complaint, in such proceeding, showed that the plaintiff had bought the land of the defendant; that the latter, by agreement with the plaintiff, continued in possession until a certain day, and held over after that day by force and strong hand. *Held*, that the complaint was sufficient.

SAME.—Such proceeding may be supported, under the statute, without proof that the entry was unlawful.

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—Suit for a forcible detainer, brought by *Osborn* against *Barton*, on the 3d of *March*, 1840, before two justices of the peace. The complaint filed is, in substance, as follows: "That *Osborn* purchased of *Barton* a certain [*146] tract of land, situate, &c., (particularly described); *that *Osborn* was to have possession on the 25th of *December*, 1839; and that *Barton* held and still holds the possession, by force and strong hand, wrongfully and unjustly." Judgment before the justices of restitution, and that the plaintiff recover his costs. Appeal by the defendant to the Circuit Court. Motion by the defendant in the Circuit Court to dismiss the suit, on the ground that the complaint was insufficient. Motion overruled. The cause was submitted to the Court, and judgment rendered that the plaintiff recover his costs, the defendant having left the premises pending the suit.

The writ of error, in this case, is objected to, on the ground that this Court has no jurisdiction, the cause having originated before two justices of the peace. It has been heretofore decided that the Court has jurisdiction in cases like this; and we adhere to that opinion. *Moore v. Read*, 1 Blackf., 177.

The judgment of the Circuit Court for the plaintiff, on the merits, is evidently wrong, as there is not the slightest proof that the least force to detain the premises had been ever used

by the defendant. The suit could not be sustained without proof that the detainer was not only unlawful but that it was by force and violence. *Boxley v. Collins*, 4 Blackf., 320.

We think, however, that the motion to dismiss the suit on account of the insufficiency of the complaint, was rightly overruled. The complaint shows that the plaintiff bought the land of the defendant; that the latter, by agreement with the plaintiff, continued in possession until a certain day; and held over after that day by force and strong hand. The defendant, under these circumstances, stood in the situation of a tenant for years, forcibly holding possession after the expiration of his term. And it is decided that if a tenant for years, after his term is expired, hold by force against the lessor, it is a forcible detainer, the possession of the termor being that of the lessor. *Snigg v. Shirton*, Cro. Jac., 199. It is also held that a mortgagor, after forfeiture of the mortgage, may be guilty of a forcible detainer by maintaining possession by force. 3 Chitt. Crim. Law, 1121; 2 Chitt. Gen. Prac., 238. These are strong authorities in favour of the validity of the complaint filed in this cause. It may be remarked, too, that the *English* law requires the defendant's entry to be considered [*147] as unlawful; *The King v. Oakley*, 4 *Barn. & Adol., 307; which is not the case under our statute. Rev. Stat., 1838, p. 307.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Test, for the plaintiff.

BROWN and Wife v. LASSELLE.

EVIDENCE—ADMISSIONS BY WIFE.—In a suit against husband and wife for a debt due by the wife *dum sola*, the plaintiff can not prove admissions made by the wife after her marriage respecting the debt.(a)

(a) *Lasselie v. Brown*, 8 Blackf., 221.

ERROR to the Allen Circuit Court.

SULLIVAN, J.—*Lasselle* brought an action of assumpsit, before a justice of the peace, against *Brown* and wife for goods sold and delivered to the wife while sole. Plea, non assumpsit. The Circuit Court gave judgment for the plaintiff below. At the trial, the Court permitted the plaintiff to prove admissions made by the wife after her marriage with *Brown*, that the account on which the suit was brought was “just.” The admissibility of this testimony constitutes the only question in the case necessary to be examined.

We think the testimony ought not to have been received. As a general rule, husband and wife can not be witnesses for or against each other. There are exceptions to the rule, as for example, where the wife acts as the agent of her husband, her admissions made at the time may be received to bind the husband; but this case does not come within them. If, from the necessity of preserving the peace of families, the wife could not be received as a witness on the trial to the injury of her husband, it follows that her declarations to his injury are equally inadmissible.

In *Kelly v. Small*, 2 Esp. Rep., 716, it was decided that in an action brought by the husband and wife for a debt due to the wife while sole, any admission respecting it, made by the wife after her marriage, is inadmissible as against her husband. And in the case of *Alban and wife et al. v.*

[*148] **Pritchett*, 6 T. R., 680, which was an action by husband and wife in right of the wife as executrix, the Court would not permit the defendant to give evidence of the declarations of the wife affecting her husband’s interests. The Court said he had an interest in the cause, and that could not be prejudiced by any act or by the evidence of the wife; that it was immaterial whether his right was or was not *jure uxoris*; it was still his right. To the same effect is the case of *Hall v. Hill et ux.*, 2 Strange, 1094.

The principle is the same, whether the suit be brought by the husband and wife or against them. The declarations of

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the wife in either case affect the husband's interests injuriously, and can not be received.(1)

The objection made by the defendants at the trial to the sufficiency of the cause of action, was correctly overruled by the Court.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the plaintiffs.

R. A. Brackenridge, for the defendant.

(1) Accord. *Barron v. Grillard*, 3 Ves. & Beam., 165; *The City Bank v. Bangs et al.*, 3 Paige, 36.

SOUTHWICK v. THE PACKET BOAT CLYDE.

MECHANICS' LIEN ON BOAT.—The person who builds a boat, &c., agreeably to his contract with the owner, &c., has a lien on the boat, under the statute, for the price, whether he has paid the workmen that assisted him and were employed by him or not; but the workmen so employed by the contractor have no such lien for their wages.

SAME.—Whether in case of such claim by the contractor, evidence of an unsuccessful attempt by him and the owner, &c., to settle, &c., is sufficient to show the demand and refusal of payment required by the statute, &c., is not for the Court, but for the jury to determine.

SAME.—The contractor in such case can only recover, in the absence of a special contract, the value of the work, &c., at the place where the boat was built; the performance of which work, &c., must be proved.

[*149] *ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—This was a proceeding under the "act authorizing the seizure of boats and other vessels for debt." Rev. Stat., 1838, p. 120. The plaintiff's demand, as stated in his affidavit, was for work and labour done in building the packet boat *Clyde*, and furnishing materials, at the request of *McAllister*, master and owner thereof. To the declaration filed, the defendant pleaded, 1, Non assumpsit; 2, Payment. Verdict and judgment for defendant.

The case comes before us on exceptions taken to the instruc-

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tions of the Court to the jury. The instructions were as follows, viz.: 1, As each and all the hands that worked on the boat in constructing it, had and have a right to seize it for any work any or either of them did, *Southwick* had no right to claim for the services of any of his hands that he had not paid off. 2, Proof of an attempt to settle the account by *McAllister* and the plaintiff, and a failure to agree, is not sufficient evidence of a demand of payment by plaintiff and refusal by defendant. 3, If *McAllister* had already paid a sum, which, with the claims outstanding in favour of others for work done and materials found, amounted to the worth or value of the boat and materials furnished, the plaintiff could not recover. 4, The plaintiff can only recover the value of his labour and materials found at the place of building the boat, unless there was a special contract to pay a larger sum. 5, The jury should not presume that the plaintiff performed the work, or furnished the materials, named in the declaration; it must be proved that he did so, or that he superintended the work.

We are of opinion that the Court erred in the first instruction. It assumes that *all* "the hands" that worked upon the boat while it was building, *by whomsoever employed*, have a lien upon the boat for the value of their labour. This assumption is not warranted by the statute. The lien is given, by the first section of the act, to those only whose debts accrued on a contract made with the master, owner, &c., of the vessel. The second and third sections of the act are of the same import.

By the second section it is provided, that any person [*150] having a demand *contracted* as aforesaid may *have a warrant, &c. The third section authorizes all persons having demands of the description aforesaid, to join in a declaration against such boat or vessel, briefly setting forth their demands and whether at the *request* of the master, owner, &c. It was therefore no defense to this action, that *Southwick* had not paid off the hands employed by him to labour on the boat. Their services were not performed at the request of the master or owner of the boat, but on a contract with *Southwick*, and they must look to him for payment.

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The second instruction was also wrong. If there was testimony, that the parties to the contract met and attempted to settle the account for building the boat, and could not agree, but separated without making the settlement, it should have been left to the jury to decide whether it amounted to proof of a demand and refusal or not. Its sufficiency would depend materially on the conduct and conversation of the parties at the interview, and the jury, not the Court, should have judged of its weight.

The third instruction, if we understand it correctly, is erroneous for the reasons given in examining the first instruction.

The fourth and fifth instructions are substantially correct.

On account of the misdirection of the Court in the first, second, and third instructions, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick and *W. H. Coombs*, for the plaintiff.

W. Wright and *H. Cooper*, for the defendant.

TAYLOR and Others v. GAY.

PROMISSORY NOTE—PROOF OF SIGNATURE.—In a suit on a promissory note against several defendants, the plaintiff need only prove its execution by those who plead the general issue under oath; its execution by the others is admitted.^(a)

SAME.—Such note is established by the plaintiff's producing it or accounting for its absence, and by his proving the defendant's signature by a
 [151] subscribing witness if there be one, and if not, by proving the defendant's handwriting: an actual delivery of the note need not be proved.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—This was an action of debt by *Gay* against *George M. Marshall*, *John Taylor*, *John Moore*, and *Alfred M. McGriff*. The declaration sets out a promissory note, alleged

(a) *Pursley v. Morrison*, 7 Ind., 356.

to have been made by *Marshall*, in the name of *G. M. Marshall*, and by the other defendants in the names of *Taylor*, *Moore*, and *McGriff*. "Not found" was suggested as to *Marshall*. *Taylor*, *Moore*, and *McGriff* pleaded *nil debent*, verified by the affidavit of *Moore*. Verdict and judgment for the plaintiff. On the trial, the plaintiff produced the note described in the declaration, and proved that *Taylor*, *Moore*, and *McGriff* were, at the date of the note, partners, under the style and firm of *Taylor, Moore, and McGriff*; and he also proved their signatures in the name of the firm. There was no proof of the execution of the note by *Marshall*. The defendants objected to the note going to the jury, but the objection was overruled, and the note read in evidence. A motion for a new trial was overruled.

The plaintiffs in error contend, that the judgment of the Circuit Court is erroneous on two grounds. First, that the action could not be maintained without proof that the note was executed by *Marshall*; and, secondly, that it was necessary to prove an actual delivery of the note by the makers.

At common law, in a joint action of assumpsit or debt on simple contract, it is necessary, under the general issue by any one of the defendants, for the plaintiff to prove the making of the contract by all the defendants, though some of them may have pleaded in confession and avoidance, been outlawed, or suffered judgment by default. *Gray et al. v. Palmers et al.*, 1 Esp., 135; *Sangster v. Mazarredo et al.*, 1 Stark. C., 161; Stark. Ev., part 4, 230; Chitt. on Bills, 618; Bayley on Bills, 227. This doctrine is the necessary consequence of the rule, that the general issue, in assumpsit or debt on simple contract is a traverse of every material part of the declaration. But by a statute of this State, the plea of *non est factum*, and [*152] all pleading denying the *execution of any written instrument specially set out as the foundation or defense of an action, are required to be supported by oath or affirmation. R. Stat., 1838, p. 449. The object of this provision is manifest. It is to save a party the delay and trouble, consequent upon his being obliged to prove the execution of a

Taylor and Others v. Gay.

written contract, when it can not with propriety be denied. This Court has heretofore decided, that, under a similar statute, the general issue under oath threw on the plaintiff the necessity of proving the execution of a note made by the defendant who pleaded the plea; but that the plea without the oath would not require such proof. *Bates et al v. Hunt*, 1 Blackf., 67.

It still, however, remains to be settled, what is to be the operation of the general issue verified by oath when it is pleaded by a part only of the defendants in a joint action? Is it to question the signature of those only who so plead, or is it, like the general issue at common law, to require proof of the execution of the contract by all the defendants? Keeping in view the object of the statute, we think its true construction is, that the plaintiff, in a joint action against several defendants on a simple contract in writing, a part only of whom plead the general issue on oath, is bound to prove the execution of the contract by those only so pleading, and that as to those who fail to plead, its execution is admitted. There was, therefore, no error in permitting the note, which was the foundation of this action, to go to the jury without proof of the signature of *Marshall*.

The other objection urged by the plaintiffs in error is also without foundation. Simple contracts in writing are established by the production of them by the plaintiff, or accounting for their absence, and by proving the signature of the defendant by a subscribing witness if there be one, and if not, by proof of his handwriting. The ceremony of *delivery* does not attach to this kind of contract as it does to specialties. *Stark. Ev.*, part 4, 75; *Chitt. on Cont.*, 2 ed., 3, 4.

Per Curiam.—The judgment is affirmed with costs.

R. A. Lockwood, for the plaintiffs.

A. Ingram and J. L. Scott, for the defendant.

Cushing, Assignee, v. Mendall.

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*CUSHING, Assignee, v. MENDALL.

ASSIGNMENT—PLEADING.—Debt by the assignee against the maker of a promissory note. The declaration set out the assignment as follows: "The said S (payee) afterwards, and before the payment of said sum of money in said promissory note specified, viz., on, &c., at, &c., indorsed said note by indorsement thereon under his hand, and then and there delivered the same to the plaintiff, yet the defendant, &c." Held, on general demurrer, that the declaration showed with sufficient certainty, that the note had been assigned to the plaintiff.

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—Debt by *Cushing*, assignee of a promissory note, against *Mendall* the maker. The declaration, after setting out the making and delivering of the note by the defendant to one *Isaac H. Southwick, &c.*, contains the following averment, viz.: "And the said *Isaac H. Southwick*, afterwards, and before the payment of the said sum of money in said promissory note specified, viz., on the day and year aforesaid, at the county aforesaid, indorsed the said promissory note by indorsement thereon under his hand, and then and there delivered the same, to the said plaintiff; yet the defendant, &c."

General demurrer to the declaration, and judgment for the defendant.

The objection made to the declaration is, that though it alleges the note to have been indorsed, it does not say that it was indorsed to the plaintiff; and, no doubt, if there be that objection, the declaration is bad. But we think the declaration may be understood as alleging that the note was indorsed and delivered to the plaintiff; or, in other words, that it was both indorsed to the plaintiff and delivered to him.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Cushing and *J. G. Marshall*, for the plaintiff.

M. G. Bright, for the defendant.

P. Harter v. Ellis and Another.

[*154] *P. HARTER v. ELLIS and Another.

ASSIGNMENT OF NOTE—PLEADING.—The declaration in a suit on a promissory note by a person not the payee against the maker, must aver an assignment of the note by the payee.

SAME.—An averment in the declaration in such case, that the payee assigned the note to the plaintiff, is equivalent to an averment that the assignment was made on the note to the plaintiff under the hand of the assignor, and is sufficient.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—Debt by *Philip Harter* against *Ellis* and *Ran-*
sin. The declaration sets out a promissory note made by the
defendants, by which they promised to pay one *Isaac V. Harter*
a certain sum of money. General demurrer to the declaration
sustained; and judgment for the defendants.

This judgment is right. The declaration does not allege
any assignment of the note by the payee to the plaintiff or to
any other person. From clerical error, or some other cause,
that part of the declaration which should aver a transfer of the
note to the plaintiff is unintelligible. The words “by indorse-
ment assigned” are there; but who assigned is not stated.
This Court formerly decided, that under the statute rendering
notes, &c., assignable, the declaration must show the assignment
to be on the note itself, and under the hand of the assignor.
Archer v. Spencer, 3 Blackf., 405. We have since ruled that
an averment, that the payee or legal holder “indorsed” or
“assigned” a note was a sufficient allegation of assignment.
Givan v. Matlock, November term, 1839.(1) We do not con-
sider the former decision as overruled by the latter; but that an
averment that a note was *indorsed* or assigned, is equivalent to
stating that it was assigned on the note under the hand of the
assignor.

Per Curiam.—The judgment is affirmed with costs.

W. M. Jenners, for the plaintiff.

R. A. Lockwood, for the defendants.

(1) Vide *Marvin v. Slaughter*, Vol. 4 of these Rep., 529; *Yeatman v. Cullen et al.*, November term, 1839.

Burke v. Miller.

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*BURKE v. MILLER.

SLANDER.—Action of slander for words charging the plaintiff with stealing the defendant's chairs, &c. Plea, the statute of limitations. The plaintiff proved the speaking of the words within the prescribed time; but, according to one of his witnesses, the words laid in the declaration were accompanied by explanations which showed the charge made to amount only to a breach of trust. *Held*, that evidence by the defendant that the plaintiff had committed such breach of trust was inadmissible on the ground of irrelevancy.

SAME—EVIDENCE.—If the plaintiff in slander prove the speaking of words not laid in the declaration tending to show malice, the defendant may, under the general issue, prove those words to be true.

SAME—EVIDENCE IN MITIGATION.—The defendant in such action may, under the general issue, prove the plaintiff's general character to be bad, in mitigation of damages; but he can not, either for that purpose or to defeat the suit, prove, under such plea, the existence of particular facts tending to show the truth of the words laid in the declaration.(a)

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—This was an action of slander brought by *Miller* against *Burke*. The words charged are as follows: "He (the plaintiff meaning) stole my chairs." Again, "He (the plaintiff meaning) stole my candlestick." There were other words charged to have been spoken by the defendant, but the suit as to those words having been discontinued by the plaintiff before the trial, it is not necessary to state them. The only plea filed, applicable to the words above set out, is a plea of the statute of limitations.

On the calling of the cause for trial, the defendant asked time to draw an affidavit for a continuance, on account of the absence of witnesses, but the Court overruled the motion.

At the trial, the plaintiff proved by one *Sherman* that the defendant had said, in presence of the witness and one *Fox*, and within the time prescribed by the statute of limitations, that *Miller*, the plaintiff, had stolen his, the defendant's, chairs. The plaintiff also introduced *Fox* as a witness, the same person mentioned by *Sherman*, who testified that he was present

(a) *Blickenstaff v. Perrin*, 27 Ind., 527; 5 Id., 426; 3 Id., 115; 8 Blackf., 134.

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when the defendant made the charge mentioned by *Sherman*, and that the defendant said the plaintiff had stolen his, the defendant's chairs; that the witness then told the defendant that that would be a difficult matter to do, and asked him how it was done; that the defendant replied it was done in this way, the plaintiff was working in the defendant's shop, (the defendant being a chair maker), and while working [*156] *there, and in the absence of the defendant and without his knowledge, the plaintiff sold a set of chairs belonging to the defendant, and took a part of the pay in money and a note for the balance.

After the plaintiff had closed his evidence, the defendant offered to prove that all he had said, as proved by *Fox*, about the plaintiff's having sold the chairs, &c., was true. But the Court refused to admit the evidence. The defendant also offered to prove that he had found a brass candlestick in the possession of the witness which belonged to the defendant, and which had been left with the witness by the plaintiff, it being the same candlestick which the defendant had charged the plaintiff with stealing. This evidence was also rejected.

Verdict for the plaintiff; motion for a new trial overruled, and judgment on the verdict.

We think the Court did right in not admitting evidence of the truth of the defendant's statement about the sale of the chairs by the plaintiff. The statement was represented by the witness to have been a part of a dialogue in which the words set out in the declaration were spoken, and to have been in explanation of the words so set out. This statement, if made, so qualified the words for which the suit was brought, as to deprive them of their actionable character. It showed that the defendant had only charged the plaintiff with a breach of trust, and not with an indictable offense. It was therefore important to inquire, whether the explanatory statement had been made at the time by the defendant; but not whether that statement was true or false: its truth or falsity had nothing to do with the case, and the testimony offered on the subject was objectionable on the ground of irrelevancy.

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The defendant contends, that when words not charged in the declaration are proved, their truth may be proved under the general issue. That doctrine is no doubt correct, where the proof of such words tends to support the suit by showing the defendant's malice in making the charge laid in the declaration. But this is not such a case. Here the words in question, the truth of which the defendant wished to prove, tended not to support but directly to defeat the action.

We are also of opinion, that the evidence offered by the defendant respecting his finding the candlestick with the witness, &c., was not admissible. This evidence can [*157] only be *considered as tending in some degree to show that the plaintiff had stolen the candlestick. It would, of itself, be entirely insufficient to prove that fact; but it might be material as connected with other testimony, such as that the candlestick had been actually stolen by some one, &c., to establish the truth of the charge in question. Had there been a plea, therefore, justifying the charge as true, the evidence in question might have been received as tending to defeat the suit; but there being no such plea, the evidence was, for that purpose, inadmissible. *Underwood v. Parks*, 2 Strange, 1200. It was also inadmissible in mitigation of damages. The defendant may, under the general issue, prove the plaintiff's general character to be bad, in mitigation of damages; but he can not under that issue prove in mitigation of damages, any more than he can prove in bar of the suit, the existence of particular facts tending to show the plaintiff's guilt. To authorize the proof of such facts, the plaintiff must have notice, by a plea of justification, of the intention to prove them. *Waithman v. Weaver et al.*, Dowl. & Ryland's N. P. Rep., 10.(1)

We see no error in the refusal of the Court to give the defendant time to draw an affidavit for a continuance. The circumstances under which the refusal took place, which are set out in a bill of exceptions, show that the defendant could not claim the time asked for as a matter of right.

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As the evidence is not set out in the record, we must presume that it was sufficient to support the verdict.

Per Curiam.—The judgment is affirmed with costs.

C. B. Smith, for the plaintiff.

S. W. Parker, and *C. H. Test*, for the defendant.

(1) Vide *Sanders v. Johnson*, ante, p. 50, and note.

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*BODLEY v. ROOP.

PLEADING.—Counts in contract and tort can not be joined.

PRACTICE.—A misjoinder of counts may be taken advantage of by demurrer, in arrest of judgment, or on writ of error.

APPEAL from the *Fountain* Circuit Court.

SULLIVAN, J.—Case. The declaration contains six counts. The first count states that *Bodley* being the owner of a lot in the town of *Covington*, on which there was a frame building, was desirous to effect an insurance on said building against loss by fire; that he applied to the defendant, who was an agent of the *Indiana Mutual Fire Insurance Company*, to make such insurance; that at the special instance and request of the defendant, and for the purpose of effecting said insurance, he delivered to defendant a blank application, a premium note, &c., which defendant received; he also paid to defendant five dollars, being ten *per cent.* on the amount of the premium note, and the further sum of one dollar as a fee to the clerk of the *Insurance Company* for writing out the policy. The count then states that defendant, *in consideration of the premises, agreed and undertook* to fill up said blank application and to effect the insurance, but that he wholly failed to do so until, &c., when the building was destroyed by fire. The second and third counts state the inducement substantially as it is stated in the first count, and aver that the defendant, in consideration thereof, *agreed and undertook* to procure a policy, &c., but that he wholly failed to do so, until, &c., when a fire broke out, &c.

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The fourth count is, that the plaintiff had employed the defendant as agent to effect said insurance, and thereupon in consideration that the plaintiff had signed a certain instrument of writing commonly called an application, together with a premium note, paid the defendant a fee, &c., it became the duty of the defendant to cause said insurance to be effected, &c.; yet the defendant wholly failed and neglected to make said insurance until, &c., when the building was destroyed by fire; whereby and by reason of the *negligence and carelessness* of the defendant, the plaintiff hath sustained great loss, &c. The fifth and sixth counts charge the defendant with *negligence* as the agent *of the plaintiff. General demurrer and judgment for defendant.

There are various questions submitted for the consideration of the Court, but if the first point raised be for the defendant, it will not be necessary to notice the rest. The defendant insists that there is a misjoinder of counts, and for that reason the Circuit Court did right in sustaining the demurrer.

In the first, second and third counts, it is alleged that the defendant, in consideration of certain things done by the plaintiff, *agreed* and *undertook* to effect an insurance on the plaintiff's house. The words "agreed and undertook" amount to a promise. It is not necessary that the word *promised* should be used, the word *agreed* being equivalent to it. *Mountford v. Horton*, 2 New R., 62. In those counts the plaintiff seeks to make the defendant liable on the contract, and not on the violation of any common law duty arising from the contract.

The fourth, fifth and sixth counts are *ex delicto*. They are framed in case, and are founded on the *negligence* of the defendant in the performance of a *duty* which he had undertaken to discharge. The case of *Corbett v. Packington*, 6 B. & C., 268, illustrates the distinction between a count in case, and a count in assumpsit.

There is, therefore, a misjoinder of counts, which is fatal not only on demurrer, but in arrest of judgment, or on writ of error. *Corbett v. Packington*, *supra*; *Cooper v. Bissell*, 16 Johns. R., 146; 1 Chitt. Pl., 205.

Pierce and Others v. Eustis.

On account of the misjoinder, the judgment of the Circuit Court is affirmed.

Per Curiam.—The judgment is affirmed with costs.

D. Mace, H. S. Lane, and S. C. Willson, for the appellant.

T. A. Howard and R. C. Gregory, for the appellee.

PIERCE and Others v. EUSTIS.

LAW-MERCHANT.—The indorsee of a bill of exchange can not maintain a joint suit against the drawer, acceptor, and indorser of the bill.

[*160] *ERROR to the Dearborn Circuit Court.

SULLIVAN, J.—*Eustis*, the indorsee, brought a joint action of assumpsit against *Pierce et al.*, the drawer, acceptor, and indorsers of a bill of exchange. There was a general demurrer to the declaration. Demurrer overruled, and judgment for the plaintiff.

It is admitted that this action can not be maintained under the common law rules of pleading, but the question is submitted whether the case is not embraced by the 11th section of the “act relative to practice in Circuit Courts.” Stat., 1839, p. 36. That statute makes it “lawful for the holder of any note negotiable by the law merchant, to institute one suit against all the parties to such note who may be liable at common law to the holder, &c.”

We are of opinion that suits on bills of exchange are not embraced by the act. The statute gives to the holder of a note negotiable by the law-merchant an enlarged remedy, but it does not extend to the holder of any other kind of negotiable paper. Where a new remedy is given by a statute in a particular case, it shall not be extended to alter the common law in any other than that case. 6 Bac. Abr. tit. statute, 1.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Macy, D. S. Major, and G. H. Dunn, for the plaintiffs.

S. C. Stevens, for the defendant.

BUTLER and Others v. T. BORDERS.

ATTACHMENT—LIABILITY OF PLAINTIFF FOR UNLAWFUL LEVY.—Although a writ of attachment be levied on goods which do not belong to the defendant, the plaintiff in attachment, having taken no part in the levy, is not liable for the conduct of the officer who made it.

ERROR to the *Morgan* Circuit Court.

SULLIVAN, J.—Replevin by *Borders* against the plaintiffs in error for unlawfully taking and detaining a horse. Pleas, 1, Non cepit; 2, Property in a stranger. The cause was, [*161] *by consent of parties, tried by the Court. Judgment for the plaintiff.

The testimony was, that the plaintiffs in error had issued an attachment against the goods, &c., of one *John Borders*, and that the constable, to whom the writ was delivered, attached the horse in controversy as the property of the said *John Borders*; that the horse, when the writ was executed, was in the possession of *James Borders*, the father of the plaintiff *Thomas*; that the plaintiffs in error were not present when the horse was seized by the constable; and that when the horse was replevied by the defendant in error, he was found in the possession of the constable. It was also proved that the horse was the property of *Thomas Borders*, the defendant in error. There was no proof that the plaintiffs in error had the possession of the horse at any time, nor that they assented to the act of the constable at any time before or after the attachment was levied.

The right of *Thomas Borders* to the property in controversy was clearly established by the proof. On that point no question is raised in this Court. But it is contended by the plaintiffs in error, that there was no evidence of a tortious taking or an unlawful detention of the horse by them, and that therefore the judgment of the Court was erroneous.

We have seen that there was no proof that the plaintiffs in error participated in the act of the constable, by which the property of the defendant in error was wrongfully attached. They therefore can not be made liable, under the issue, unless

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the single fact that they were the attaching creditors makes them so. But that alone is not sufficient. If a sheriff take the goods of one person upon an execution against another, an action of trespass may be supported against him, but it can not be brought against the plaintiff in the action, unless he actually interfered or assented to the levy. *Saunderson v. Baker*, 3 Wils., 309. If the person injured prefer the action of replevin to the action of trespass, there is no reason why the same principle should not apply in the former action.

The defendant in error relies upon the case of the *Louisville and Portland Canal Co. v. Holborn*, 2 Blackf., 267, to support the judgment of the Circuit Court. But the issues in that case were essentially different from the one now before [*162] *us. The pleas there were, property in the defendant, and property in a stranger. The taking by the defendant was admitted. Under those facts, the Court decided that the action of replevin would lie.

In the present case, the taking and detention are denied, and there is no proof that, by word or deed, the plaintiffs in error were guilty of either.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. J. Peaslee, for the plaintiffs.

C. C. Nave and B. Bull, for the defendant.

SMITH v. STEWART.

PLEADING.—The plea of *nil debet* to debt on a specialty is bad on general demurrer.

MORTGAGE.—If the *proviso* or condition of a mortgage do not contain an express covenant, it will not sustain an action either of debt or covenant.(a)

APPEAL from the Warren Circuit Court. The appellant was the defendant below.

(a) *Hunt v. Harding*, 11 Ind., 245.

DEWEY, J.—This was an action of debt founded upon a mortgage deed. The declaration, after reciting the deed, sets out the condition substantially as follows: That if the defendant should pay to the plaintiff the contents of two promissory notes, given to the latter by the former, one for \$480 payable on the 1st of *March*, 1840, and the other for a like sum payable one year later, then the deed to be null and void. The breach assigned is the non-payment of these several sums. The defendant pleaded, 1st, *nil debet*; 2d, payment; 3d, fraud in procuring the mortgage. The plaintiff demurred generally to the first plea; and replied to the other two, traversing the matters which they contained. There were issues upon the replications. The Court decided in favour of the plaintiff on the demurrer. Verdict and judgment also in his favour upon the issues of fact.

The question presented by the record arises from the demurrer to the plea of *nil debet*. That plea, having been pleaded to an action founded on a specialty, was [*163] *undoubtedly bad on general demurrer.(1) But the inquiry, whether the declaration contains any good cause of action, remains for our consideration.

The proviso or condition in a mortgage, that the deed shall be void if the mortgagor pay a sum of money, or perform some other act, will not enable the mortgagee to maintain debt for the money, or covenant for the non-performance of the act; to sustain either action there must be an express covenant, which has not been complied with. The performance of the condition, in the absence of such a covenant, is a matter optional with the mortgagor. He may take his choice between a compliance with the condition, and the consequence of a failure, which, at law, is a forfeiture of the land. 4 Kent's Comm., 2d ed., 145; *Briscoe v. King*, Cro. Jac., 281; *Howell v. Price*, 1 P. Will., 291; *Drummond v. Richards*, 2 Munf., 337. The statement by Chitty, in his 1st Vol. on Pl., 110, 116, relied on by the appellee, that debt or covenant will lie on a mortgage, has reference to the customary *English* mortgage, which contains an express covenant to pay the mortgage money.

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The condition of the mortgage set out in the declaration contains no covenant; it is simply a defeasance, and can not be the foundation of an action. The judgment on the demurrer should have been for the defendant.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory, for the appellant.

W. M. Jenners and *R. A. Chandler*, for the appellee.

(1) Accord. *Love v. Kidwell*, Vol. 4 of these Rep., 553.

WEBSTER v. FARLEY.

CA. SA., FORM OF—DISCHARGE FROM.—A *capias ad satisfaciendum* commenced as follows: “*State of Indiana, Henry county, ss. To Wm. O. Webster, constable,*” &c. *Held*, that this commencement of the writ was sufficient.

Held, also, that a debtor arrested on such writ could not, under the [*164] statute of *1838, be discharged from custody by delivering to the constable a schedule of property situate out of the State, and swearing that he had no other property subject to execution, &c.(a)

SAME.—It is the magistrate’s duty, before whom the debtor makes oath in order to be discharged under said statute, to reduce the oath to writing, cause the debtor to sign it, and hand it over to the officer making the arrest, who should make it a part of his return, and append it to the writ.

APPEAL from the *Henry Circuit Court*.

DEWEY, J.—This was an action of debt commenced by *Farley* against *Webster*, a constable, for the voluntary escape of one *Perryman*, whom *Webster* had arrested on a *ca. sa.* in favour of *Farley*. The declaration is in the usual form. The parties submitted an agreed case to the Court below. The facts are substantially these, viz.: *Farley* had obtained a judgment against *Perryman* before a justice of the peace; a *fi. fa.* issued which was returned “no property found;” whereupon a *ca. sa.* was sued out, the style of which was “*State of Indiana, Henry county, ss.*” This latter execution at the commencement of the

(a) *Wendover v. Tucker*, 4 Ind., 381.

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writ, without repeating the name of the State, was directed to *Webster* as a constable, and placed in his hands; and he arrested *Perryman* upon it. *Perryman*, upon his request, (the plaintiff having notice), was taken by *Webster* to a justice of the peace, before whom he made and subscribed a written statement, which, after reciting his arrest, and expressing his purpose of discharging himself therefrom, alleged that he then delivered to the constable "a schedule of all his property subject to execution." The schedule contained an undivided half of a quarter section of land in *Illinois*, and one-half of a Durham calf in the possession of the other half owner in *Missouri*. *Perryman* then made and subscribed an affidavit before the justice, that he had no more or other property real or personal subject to execution, than that contained in the schedule; and that he had no moneys, rights, credits, or effects in his possession, or under his control, or in the possession or under the control of any other person for his use; and that he had not, directly or indirectly, disposed of, transferred, or concealed any of his property, rights, credits, moneys, or effects, with intent to defraud his creditors. The constable thereupon discharged *Perryman* from arrest, and made the following return of the *ca. sa.*:

"I have executed the within as commanded, by
[*165] *taking the body of the within *Thomas H. Perryman* before *Abraham Elliott*, a justice of the peace within said county; and the said *Perryman* discharged himself from my custody by giving up the following property, to wit, the undivided half of one hundred and sixty acres of land in *McLean* county, *Illinois*, and also one-half of a Durham calf, in the possession of ———, in *Boone* county, *Missouri*, and making oath that they were all the property he had subject to execution."

The Circuit Court adjudged the law to be for the plaintiff, and rendered judgment in his favour for the amount due on the execution.

The validity of the judgment is questioned on two grounds, 1, That the *ca. sa.*, by virtue of which the defendant made the arrest, not running in the style required by the constitution,

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was void, and did not authorize the arrest and detention of the execution-debtor; 2, That under the execution law, the debtor entitled himself to a discharge from custody, by surrendering his property to the constable, and taking the requisite oath.

With regard to the first point. The constitution requires the style of all process to be "*The State of Indiana.*" Art. 5, sec. 11. This Court has heretofore held, that process commencing, "*The State of Indiana,*" was sufficient, without repeating the name of the State in the mandatory part of it. *Cooper v. Adams et al.*, 2 Blackf., 294. The execution before us commences "*State of Indiana.*" We consider this a substantial compliance with the constitution. It means precisely the same as the *The State of Indiana*. Besides, it is worthy of remark that every form of process, prescribed by the Legislature for justices of the peace, begins, "*State of Indiana.*" These forms have been long in use; to pronounce all process conformable to them void, would be attended by pernicious consequences.

The second point is equally untenable. The law subjecting real and personal estate to execution contemplates three cases, in which a debtor arrested on execution may discharge himself from custody. The first is, when he delivers to the officer making the arrest property sufficient to satisfy the writ; the second, by surrendering to the officer all his property, swearing he has no other subject to execution, and taking a [*166] further oath similar to that set out in the agreed *case; the third instance is, when he shall swear that he has no property whatever subject to execution, and take the additional oath as in the second case. R. Stat., 1838, p. 282.

We do not think the debtor, *Perryman*, brought himself within any of these provisions. The two first evidently contemplate the actual delivery of property to the officer; and the last, that the debtor shall make oath he has none subject to execution. *Perryman* did not deliver property to the constable, he delivered only a schedule; and he did not swear that he was destitute of property. We are aware that this construction of the statute will exclude from its benefits an arrested

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debtor, who may have property without the limits of the State, or otherwise beyond the reach of an execution; and such we believe was the intention of the Legislature. We understand the phrase, "property subject to execution," as used in the statute, to mean those goods which the act does not exempt from seizure; we do not understand it to mean property which is beyond the bailiwick of the officer, or which from its character can not be seized on execution.

There is another feature presented by the agreed case, which renders it very doubtful whether the defendant's justification is made out, even admitting *Perryman* had entitled himself to a discharge from custody. It is the duty of the magistrate, before whom the debtor makes his oath, to reduce it to writing, cause the debtor to sign it, and hand it over to the officer, who is required to make it a part of his return, and append it to the writ. R. Stat., 1838, p. 282. This was not done in the present case. The oath which the constable did return was only a part of that taken by the debtor; and it does not appear to have been appended to the writ.(1)

Per Curiam.—The judgment is affirmed, with one *per cent.* damages and costs.

J. T. Elliott, for the appellant.

J. S. Newman, for the appellee.

(1) Imprisonment for debt is now abolished in this State, except in cases of fraud, &c. Stat., 1842, p. 68.

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BILL OF EXCEPTIONS.—A bill of exceptions, taken in a suit on the assignment of a promissory note, stated that the plaintiff produced certain evidence, viz., the following note and indorsement. (Insert said note and indorsement.) *Held*, that the bill did not show that the note and assignment, under which the plaintiff claimed, were produced at the trial.(a)

(a) *Wells v. Simmonds*, 10 Ind., 404.

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ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD J.—Assumpsit brought by *Clark* against *Spears* on the assignment of a promissory note. The declaration describes the note as having been made by *Taylor* and *Smith* to *Marshall*, indorsed by the payee to *Sumner*, by the latter to *Spears*, and by *Spears*, who is the defendant, to the plaintiff. The declaration also states that the plaintiff indorsed the note to *Mains*; that the latter sued the makers and obtained judgment, on which a *feri facias* was issued and returned no property found; that the plaintiff paid the amount of the note to *Mains*, and received back the note, &c. Plea, the general issue. The cause was submitted to the Court, and judgment rendered for the plaintiff.

A bill of exceptions was filed by the defendant. The bill, after stating the defendant's admission of the judgment obtained by *Mains*, the execution, return, &c., proceeded as follows: "And the following is the only evidence produced by the plaintiff, viz., the following promissory note, with the following indorsements thereon, to wit, (insert said note and said indorsements thereon); and that *Robert A. Chandler*, as attorney of said *Clark*, a short time after said return had been made, presented said note to the defendant for payment, &c."

The bill of exceptions, which professes to contain all the plaintiff's evidence, does not show that the note and indorsements under which the plaintiff claimed, were produced at the trial. This omission is fatal. *Arnold v. Sturges*, Nov. term, 1839. The words in the bill, "insert said note and said indorsements thereon, amount to nothing.

Per Curiam.—The judgment is reversed with costs. Cause, remanded, &c.

A. Ingram and *Z. Baird*, for the plaintiff.

R. A. Chandler, for the defendant.

The State, on the Relation of Johnson, v. SOVERNS and Others.

[*168] *McKAY and Another v. CRAIG, in Error.

THE declaration in a suit on a delivery bond, stated the condition of the bond to be for the delivery of the goods on the *twentieth of June*, 1840, at the *farm of D. McKay*. The condition of the bond, as shown on *oyer*, was for the delivery of the goods on the *second of June*, 1840, at the *house of said McKay*. *Held*, on general demurrer to the declaration, that the variance was fatal. 1 Chitt. Pl., 305, *et seq.*

If in a suit on such bond, the plaintiff obtain judgment on a demurrer to the declaration, the damages must, in the absence of any agreement of the parties, be assessed by a jury. *Tannehill v. Thomas*, 1 Blackf., 144; *Thompson et al. v. Wilson*, Id., 358.

THE STATE, on the Relation of JOHNSON, v. SOVERNS and Others.

CONSTABLE'S BOND, SUIT ON—PLEADING.—In debt on a constable's bond against the principal and his sureties, because of the constable's failure to make the money due on an execution, the declaration must aver that the execution-debtor had goods on which the constable might have levied.(a)

APPEAL from the *Pike* Circuit Court.

DEWEY, J.—This was an action of debt against a constable and his sureties on his official bond, conditioned, in the usual form, for the payment over of all moneys collected, and for the discharge of his duties generally. The declaration, after setting out the bond and condition, and reciting two judgments recovered by the relator, *Johnson*, before a justice of the peace, and executions of *fi. fa.* issued thereon, and the delivery of the latter to the constable to be collected, assigns for breach of the condition of the bond, in reference to each execution, that the

(a) *Mayor v. The State*, 8 Blackf., 71; *State v. Shackelford*, 15 Ind., 876

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constable, "not regarding his duties as such constable, but contriving, &c., did not cause the money to be made according to the exigency of said writ, but therein wholly failed and made default; but returned the same to the office of the [*169] justice aforesaid, with a promise in *writing indorsed thereon, under the hand of one *J. P. Traylor*, that the said *Traylor* would pay the said judgment, &c., within eight months, if the execution-debtor did not." The declaration contains no averment, that the execution-debtor had goods and chattels in the bailiwick of the constable, which he might have levied upon, and out of which he might have made the money, or a part of it, due on the executions. The defendant demurred generally, and the demurrer was sustained; upon which a final judgment was rendered in his favour.

In our opinion the judgment is right. The declaration shows no violation of duty on the part of the constable. The mere failure to make the money on the execution is not sufficient to charge him. The declaration should have averred, that the execution-debtor had property on which the constable might have levied, 1 Chitt. Pl., 138; Stark. Ev., part 4, 1344; 2 Chitt. Pl., 750; *Jones v. Clayton*, 4 M. & S., 349.

Per Curiam.—The judgment is affirmed at the costs of the relator.

E. S. Terry, for the appellant.

J. Pitcher, for the appellees.

RICKET and Wife v. STANLEY.

SLANDER—PLEADING.—The defendant, in a suit for slander brought by husband and wife, pleaded the general issue and several pleas in justification.

Held, that the marriage of the plaintiffs was admitted by the pleas.

SAME.—Action of slander brought by *A* and *Mary A*, his wife, for the following words charged to have been spoken of the wife, and of and concerning her character for chastity: "Have you heard that *B* was hunting up a story in circulation about *C* and *Mary A* (meaning, &c.), being seen in the woods together? I saw them in the woods together myself, &c. If you had seen

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what I have, you would feel satisfied in your mind. God knows and I know that they are intimate." Thereby meaning that said *Mary* had been guilty of adultery with *C*. *Held*, that the words were not actionable, unless they were spoken in a conversation about the wife's character for chastity. [170] *Held*, also, that as the general issue in said case was pleaded, as well as pleas admitting the speaking of the words, the plaintiff was bound to prove the cause of action in the same manner as if the special pleas had not been filed.

SAME.—The special pleas in said suit were, 1, That the words were true, without averring them to be true in the sense ascribed to them in the declaration; 2, That before the speaking, &c., said *Mary* had been delivered of a bastard child; 3, That before, &c., she had been guilty of adultery with *C*; 4, That before, &c., she had been guilty of adultery with *D*; *Held*, that these pleas, except the third, were insufficient.

APPEAL from the *DeKalb* Circuit Court.

BLACKFORD, J.—Slander. The declaration contains five counts.

First count. *James S. Stanley* was attached to answer *Jonathan Ricket* and *Mary* his wife of a plea of, &c. For that whereas, &c., in a conversation which the defendant had with one *Nelson Griffith*, of and concerning the said *Mary* and her character for chastity, the defendant falsely, &c., spoke and published of and concerning the said *Mary* and her character for chastity, these false, &c., words, viz., "Have you (meaning said *Griffith*) heard that *John Loomis* was hunting up a story that was in circulation about *Culbertson* (meaning one *William Culbertson*) and *Mary Ricket* (meaning said *Mary Ricket*) being seen in the woods together? If they want to know who raised the story, if they come to me I will tell them, for I saw them in the woods together myself north of the swamp, back of my field near the hay road." Thereby meaning and intending that she, the said *Mary*, had been and there was guilty of adultery and illicit intercourse with said *Culbertson*.

Second count. And afterwards in a certain other discourse, which the defendant had with one *William Moore*, of and concerning the said *Mary* and her character for chastity, the defendant falsely, &c., spoke and published of and concerning the said *Mary* and her character for chastity, these other false, &c., words, viz., "If you (meaning said *Moore*) had seen what

I have seen, you would feel satisfied in your mind." Thereby meaning, &c., (as stated in the first count.)

Third count. And afterwards, in a certain other discourse, which the defendant had with one *Michael Knight*, of and concerning said *Culbertson* and said *Mary* and her character [*171] actor *for chastity, the defendant falsely, &c., spoke and published of and concerning the said *Mary* and her character for chastity, these other false, &c., words, viz.: "God knows and I know that they are intimate," (meaning said *Culbertson* and said *Mary*.) "They (meaning said *Culbertson* and said *Mary*) are intimate, God knows and I know." Thereby meaning, &c., (as stated in the first count.)

The fourth count is similar to the first; and the fifth is similar to the second, except that it does not allege the discourse with *Moore* to have been of and concerning the wife's character for chastity, nor that the words were spoken of and concerning her character for chastity.

Pleas, 1, The general issue. 2, To the first count; that before the speaking, &c., the defendant saw said *Mary* and said *Culbertson* in the woods together north of the swamp, back of defendant's field and near the hay road; wherefore the defendant spoke, &c. 3, *Actio non*; that before the speaking, &c., and before said *Mary's* marriage, she was delivered of a bastard child; wherefore the defendant spoke, &c. 4, *Actio non*; that before the speaking, &c., said *Mary* was guilty of adultery and illicit intercourse with the said *Culbertson*; wherefore the defendant spoke, &c. 5, *Actio non*; that before the speaking, &c., said *Mary* was guilty of adultery and illicit intercourse with one *Lowry Fisher*; wherefore the defendant spoke, &c.

Replications in denial of the fourth and fifth pleas.

On the trial, the Court, at the defendant's request, charged the jury, in substance, as follows: 1, That the plaintiffs, in this case, can not recover without proof of their marriage. 2, That the words charged in the declaration are not actionable, unless spoken in a conversation about the wife's character for chastity. 3, That the plaintiffs must prove the speaking of the

words, notwithstanding the admission of the special pleas, the general issue being filed.

Verdict and judgment for the defendant.

We consider the first instruction to the jury to be erroneous. The character in which the plaintiffs sue, viz., that of husband and wife, is admitted by the pleas. *Dickenson et ux. v. Davis*, 1 Strange, 480; 2 Starkie's Ev., 388; Peake's Ev., 329; *Coombs et ux. v. Williams*, 15 Mass., 243.

The second instruction is correct. The words alleged to have been spoken, taken by themselves, do not sustain the *innuendo* inserted in each count, viz., that the defendant thereby meant that the wife had been guilty of adultery with *Culbertson*; neither is there any introductory allegation which, independently of the *colloquium* about the wife's character for chastity, would show that such was the meaning of the defendant by the words charged to have been spoken. It is that *colloquium*, inserted in the first four counts, which makes the words in those counts actionable, and the plaintiffs were consequently bound to prove it.

The third instruction is right. The plaintiff was obliged to prove his cause of action under the general issue, in the same manner as if no other plea had been filed. This point is so decided by this Court in *Wheeler v. Robb*, 1 Blackf., 330, and in *Arnold v. Sturges*, November term, 1839.

The second plea, which is to the first count, is substantially bad. The cause of action described in that count is not the mere speaking of the words charged, and, of course, it can not be justified by merely alleging that the words are true. The count alleges that the defendant meant, by the words spoken, that the wife had committed adultery with *Culbertson*; and it shows, as it was necessary it should, that such was the defendant's meaning. The plea necessarily admits the words to have been spoken in the sense ascribed to them in the declaration, and it must therefore aver them to be, in that sense, true. There is no such averment here, and the plea is therefore defective.

The third and fifth pleas are insufficient. That the wife had

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been delivered of a bastard child, or that she had been guilty of adultery with *Fisher*, could be no justification to the defendant for charging her with having committed adultery with *Culbertson*, which is the charge complained of in all the counts.

The fourth plea is unobjectionable, except that it ought not to have been pleaded to the fifth count; that count [*173] being *bad, as appears from what we have said respecting the second instruction given to the jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Howe, for the appellants.

D. H. Colerick, *W. H. Coombs*, and *T. Johnson*, for the appellee.

THE STATE, on the Relation of ANDERSON, Treasurer, &c., v. LEONARD and Others.

OFFICIAL BOND—PLEADING.—In a suit on a bond conditioned for the performance of covenants, the plaintiff may declare as on a common bond, without setting out the condition, &c. (a)

SAME.—The declaration, in a suit on a bond of a collector of taxes, after setting out the condition, stated that an assessor was appointed by the board of commissioners, &c.; that he gave bond and took the oath required by law; that he made an assessment of the taxable property in the county, and delivered a list to said board, who corrected it, &c., and fixed the ratio; that the clerk made out and delivered to the collector a proper duplicate of the roll and tax list, &c., with a precept commanding him, &c.; that the latter failed to collect, &c. *Held*, that the performance of the duties of the assessor and clerk was shown with sufficient certainty.

PLEADING.—It is not necessary in pleading to state that which is merely matter of evidence.

ERROR to the *Clay* Circuit Court.

SULLIVAN, J.—Debt on a collector's bond. There were two counts in the declaration; the first as on a common bond; the second set out the condition and assigned breaches. Gen-

(a) 8 Blackf., 527.

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eral demurrer to the first count, and special demurrer to the second. The demurrers were sustained and judgment given for the defendants.

The ground upon which the Court sustained the demurrer to the first count was, that it did not set out the condition of the bond, and contain an assignment of breaches. It was decided by this Court in the case of *Evans et al. v. The State*, 2 Blackf., 387, that in a suit upon a bond like the one before us, it was at the option of the plaintiff to declare as [*174] *upon a common bond, and assign breaches in his replication to the defendant's plea, or suggest them upon the record, as the case might require; or to set out the condition in his declaration and assign the breaches there. That decision has been subsequently recognized and followed. *The State, &c., v. Kizer*, Nov. Term, 1841.(1) The Court, therefore, erred in sustaining the demurrer to that count.

We think the Court also erred in sustaining the demurrer to the second count. It is averred in that count, that an assessor was appointed by the board of commissioners at the proper term, for the year 1838; that he entered into bond and took the oath required by law; that he made an assessment of the taxable property in *Clay* county, and delivered a list sworn to, to the board of commissioners, who carefully compared, corrected, and approved it; that they fixed the ratio; that the clerk made out and delivered to the collector a proper duplicate of said roll and tax list, corrected and approved as aforesaid, together with a precept commanding him, &c.

The exceptions taken to the count relate to the manner in which the assessor and clerk performed their duties. For example, it is contended that the count is bad, because it does not show that the assessor set down each township in alphabetical order, as the statute directs; nor that the assessment was made on actual view, and the lands of residents and non-residents separately assessed; that it does not appear that the clerk prepared a list, &c., within twenty days after the appointment of the assessor, &c. The objections are not well founded. It appears from the declaration, that an assessment

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was made by an assessor duly appointed, and that a corrected duplicate of the assessment roll, such as the law requires, together with the proper writ, was delivered by the clerk to the collector. This was sufficient, *prima facie*, to make the defendants liable, if the collector failed to collect, or failed to pay over the amount collected by him. Even if the plaintiff were bound to prove upon the trial, that the assessor and clerk had discharged their duties in the particular manner directed by the statute, a question which we do not now determine, we think the averments in the *second count are sufficient to admit the proof. It is not necessary in pleading to state that which is merely matter of evidence. Steph. on Pl., 342.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal and C. P. Hester, for the State.

A. Kinney and S. B. Gookins, for the defendants.

(1) Ante, p. 44.

SLOAN v. THE RICHMOND TRADING AND MANUFACTURING COMPANY.

NOTE OBTAINED BY FRAUD—RIGHTS OF ASSIGNEE AGAINST MAKER.—

Although a promissory note be obtained from the maker by fraud, &c., yet if he induce an innocent person to take an assignment of it without disclosing the objection, he will be liable to the assignee on the note, notwithstanding the fraud, &c.(a)

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—This was an action of debt brought against *Sloan* by *The Richmond Trading and Manufacturing Company*. The suit is founded on two promissory notes executed by the

(a) See cases cited in *Morrison v. Weaver*, 16 Ind., 344.

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defendant to one *M. Cromelian*, and by him assigned to the plaintiffs.

Pleas, 1, That the notes were given to the payee for the balance due on a quantity of liquors purchased by the defendant of the payee; that the payee warranted the liquors to be of the best quality, &c.; whereas they were of a very inferior quality, &c.; that the defendant had paid the payee more than the liquors were worth, &c. 2, That the notes were obtained by the payee from the defendant by fraud, covin, and misrepresentation.

Replication to the pleas, that before and at the time of the assignment of the notes, the plaintiffs being about to purchase them, requested the defendant to inform them whether the notes were given for a valuable consideration, and whether he had any defense or set-off to them; that thereupon

[*176] the *defendant informed and promised the plaintiffs that the notes were given to the payee for a valuable consideration; that the defendant had no defense or set-off against them; and if the plaintiffs would purchase the notes, the defendant would pay them according to their tenor and effect; whereupon the plaintiffs, upon the information and promises aforesaid, purchased the notes, &c.

Rejoinder, that at the said time when, &c., and before the assignment, the defendant had not examined the liquors for which the notes were given, and had no knowledge of their bad quality.

General demurrer to the rejoinder, and judgment for the plaintiffs.

The defendant does not pretend that his rejoinder can be supported, but he says that the replication is bad. This is a plain case. The facts stated in the replication, viz., that the plaintiffs were induced to purchase the notes by the defendant's representation and promise to them that the notes were good and would be paid, preclude the defendant from the defense set up by either of the pleas. This obvious principle is adverted to and recognized in the case of *Muchmore v. Bates*, 1 Blackf., 248.

Steel v. Pope.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages and costs.

C. H. Test, for the plaintiff.

J. S. Newman, for the defendants.

STEEL v. POPE.

EVIDENCE—AUTHENTICATED COPIES OF WRITINGS.—Copies of process issued by a justice of the peace and regularly returned, are, when properly authenticated, legal evidence, without accounting for the absence of the original.

SAME—CERTIFICATE OF JUSTICE.—The certificate of a justice of the peace, that a State warrant, issued by another justice, is on file in the office of the justice giving the certificate, is *prima facie* evidence that it is legally there; and his certificate, that a copy of the warrant is a true copy, is a sufficient authentication.

[*177] *APPEAL from the *Delaware* Circuit Court.

DEWEY, J.—*Pope* brought an action on the case against *Steel* for maliciously causing his arrest on a false charge of his having usurped the office of a constable. The declaration alleges that the arrest was made by virtue of a warrant issued by justice *Shoemaker*; and that the plaintiff was carried before one justice *Helm* for examination, who acquitted him, &c. The cause went to trial on the general issue; verdict and judgment for the plaintiff.

There was a special plea, a demurrer to which was correctly sustained.

On the trial, the plaintiff offered in evidence a copy of the warrant issued by justice *Shoemaker*, authenticated in the following manner: "I do hereby certify the above to be a true copy of a State warrant against *Joel W. Pope*, now on file in my office." The certificate was under the hand and seal of justice *Helm*. The defendant objected to its admission, but the objection was overruled, and the copy read to the jury.

It is contended by the appellant, that the copy was secondary evidence, and inadmissible without accounting for the ab-

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sence of the original warrant; and also that it was not legally authenticated.

Copies of "the proceedings and judgments" of justices of the peace are legal evidence, if certified to be "true and complete" under the hands and seals of those before whom they took place, or of those who may have the legal custody of them. R. Stat., 1838, p. 274. Process issued by a justice of the peace, and regularly returned, is within the spirit, if not the letter, of this provision. There is equal reason for making the copies of such process, and of judgments, evidence. The originals of neither can be removed from the usual place of keeping them without public inconvenience.

The copy of the warrant produced and given in evidence in this cause was sufficiently authenticated. The law allows a person, charged with a crime, to be arrested by process issued by one justice, and to be taken before another for examination or trial. R. Stat., 1838, p. 360. When this is done, the latter justice is the proper keeper of the process. The certificate of justice *Helm*, that the warrant in question was on file in [*178] his office, is *prima facie* evidence that it was *legally in his custody. He was therefore, by the statute, the proper person to authenticate it; and his certificate, that the copy was a "true" one, was sufficient without adding "complete." It could not be a true, without being a complete copy of the warrant.

Per Curiam.—The judgment is affirmed, with 5 *per cent*. damages and costs.

J. Smith, for the appellant.

C. H. Test, for the appellee

PAYNE v MILLER.

JURISDICTION.—In a suit before a justice of the peace for less than \$20.00, the defendant claimed as a set-off \$30.50, and the plaintiff obtained judgment for a part of his demand. An appeal by the defendant to the Circuit Court

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being dismissed, he sued out a writ of error and obtained a *supersedeas*. Held, that the Supreme Court had jurisdiction of the cause.

AWARD.—An award, on which a justice of the peace has rendered judgment, may be impeached before the justice within ten days from the rendition of the judgment; or it may be impeached in the Circuit Court on appeal, though it was not objected to before the justice.

ERROR to the *Parke* Circuit Court.

DEWEY, J.—This was an action of assumpsit on book account commenced before a justice of the peace. The plaintiff claimed \$19.50. The defendant filed a set-off of \$30.50. The parties submitted the cause to arbitrators, who made an award in favour of the plaintiff for \$12.98, upon which the justice rendered judgment. The defendant appealed to the Circuit Court, where the plaintiff moved to dismiss the appeal; but before the decision of the motion, the defendant offered evidence to prove that the award had been “obtained by fraud and other undue means.” The Court refused the evidence and dismissed the appeal. The defendant has brought the record to this Court, and procured a *supersedeas*.

It is contended by the defendant in error that this Court has no jurisdiction over the cause, on the ground [*179] that the *amount in controversy, exclusive of costs, is less than \$20.00.

It is true, that the demand of the plaintiff below does not equal that sum. But the real amount in controversy is to be ascertained by taking into view also the claim of the defendant, which is \$30.50. As the defendant was entitled, before the justice, to the benefit of the general issue, if the plaintiff had failed to prove his demand, and the defendant had succeeded in establishing his, he would have been entitled to a judgment for the full amount of it. R. Stat., 1838, p. 370. And he has still the right to contend for it, if he can get rid of the award. It is evident, therefore, that the amount involved in the controversy is, exclusive of costs, more than \$20.00. This, upon the granting of a *supersedeas*, gives the Court jurisdiction. R. Stat., 1838, p. 202.

We think the decision of the Circuit Court, refusing to hear

the testimony offered by the defendant to show that the award had been obtained by fraud, and dismissing the appeal, was erroneous. Where parties, litigating before a justice of the peace, submit their cause to arbitrators, the award is to be entered on the docket, and to become the foundation of a judgment conclusive against both parties; unless it shall be made to appear to the justice, by satisfactory proof within ten days after the rendition of the judgment, that the award was obtained by "fraud, corruption, or other undue means; or unless, on appeal to the Circuit Court, the same objection shall be established by evidence, or it shall appear that the arbitrators made "a plain and palpable mistake of law to the injury of one of the parties." If the award shall be thus impeached in the one Court, or the other, it is to be set aside, and the cause proceed as if no award had ever been made. R. Stat., 1838, p. 371. The right of a party to invalidate such an award in the Circuit Court is open, though he made no objection to it before the justice. The Circuit Court should have heard the evidence offered by the defendant to impeach the award. But even if that had been properly rejected, they should not have dismissed the appeal, but have rendered judgment in favour of the plaintiff on the award.

[*180] **Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

T. A. Howard, for the plaintiff.

J. A. Wright, for the defendant.

NICHOLS v. WOODRUFF.

SPECIAL BAIL.—A *scire facias* on a recognizance of special bail indorsed, as the statute requires, on a *capias ad respondendum*, should aver, *inter alia*, that the principal had not rendered himself in discharge of the judgment.

Nichols v. Woodruff.

ERROR to the *LaGrange* Circuit Court.

BLACKFORD, J.—This was a *scire facias*, issued in favour of *Woodruff* against *Nichols*, on a recognizance entered into by the latter as special bail for one *Ray* in an action of assumpsit. The *scire facias* states the arrest of *Ray*, and that *Nichols* entered into the following recognizance indorsed on the *capias ad respondendum*, viz., “I, *Drusus Nichols*, acknowledge myself special bail for the within named *George Ray* in the within named suit. Given under my hand and seal this 25th of September, 1839. *Drusus Nichols*, (SEAL.)” It further states that the plaintiff recovered a judgment in the original suit for the sum of, &c.; that a *fiery facias* issued thereon and was returned no property found; that a *capias ad satisfaciendum* subsequently issued, and was returned *non est inventus*; that the judgment remained unpaid; and that *Nichols* had not paid the judgment, nor surrendered *Ray* according to the recognizance.

There are six pleas. Special demurrers to the first four, and replications in denial of the others. The demurrers were sustained; the issues on the last two pleas tried; and judgment rendered for the plaintiff.

This judgment is erroneous. The recognizance is in the form prescribed by the statute, and is to be construed as if its terms were particularly set out. It must be considered that one of the terms of the recognizance was, that if the defendant in the original suit should render himself in discharge [*181] of the judgment, the recognizance was to be void. *The *scire facias* omits to aver that such render had not been made, and is consequently insufficient on demurrer.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. B. Howe, for the plaintiff.

H. Cooper, for the defendant.

Crawford, District Treasurer, &c., v. Dean, Township Treasurer, &c.

CRAWFORD, District Treasurer, &c., v. DEAN, Township Treasurer, &c.

SUIT BY OFFICER.—The treasurer of a school district could not, under the statute of 1838, sue in his own name for money due to the district.(a)

ERROR to the *Grant* Circuit Court.

SULLIVAN, J.—The plaintiff, as treasurer of one of the school districts in *Grant* county, sued the defendant as township treasurer in an action of debt, alleging in his declaration that on the second *Monday of March*, 1840, the plaintiff filed with defendant a list of the children in said district “under the age of twenty-one years,” also a list made out by the teacher of the school of the district, showing the number of pupils sent to such school by persons entitled to a distributive share of the school funds of said district, verified by the affidavit of the teacher, and thereupon demanded the distributive share, to wit, &c., then in the hands of the defendant belonging to said district, but defendant refused, &c. Pleas, 1, *Nil debet*. 2, *Former judgment*. At the trial, the plaintiff offered in evidence a paper, purporting to be “a list showing the number of scholars sent to school in said district, commencing on the 18th of *November*, 1839, and ending on the 5th of *March*, 1840,” verified by the affidavit of the teacher of the school. The defendant objected to the evidence, and it was excluded, to which the plaintiff excepted. Verdict and judgment for the defendant.

It is not necessary to the decision of this case, that we should determine whether the Circuit Court did right or not,

in rejecting the paper offered in evidence by the plaintiff. If it be admitted that it tended to prove an important fact in the case, that is, that a school had been taught in the district, and that it should have been received for that purpose, there is still an objection, that meets us *in limine*, fatal to the plaintiff’s right to recover. It is, as to the right of the district treasurer to institute the suit in his

(a)7 Blackf., 552; 3 Ind., 508.

Winn v. Burt, on Appeal.

own name. The 15th chap. of the act incorporating congressional townships, &c., Rev. Stat., 1838, p. 509, which was the act in force at the time this suit was brought, authorized the district trustees to sue by that name in certain cases, but there was no authority given in any part of the statute to the treasurer to bring suit in his own name, in any case. The trustees had the general superintendence and control of the affairs of the district, and the treasurer was the agent of the board, upon whom the law devolved certain prescribed duties, but the right to sue, as before stated, was not conferred.

The principle was settled in the case of *Piggott v. Thompson*, 3 Bos. & Pul., 147, whereby an agreement in writing signed by *Thompson*, he promised to pay to the treasurer of a board of commissioners appointed to drain lands, &c., the rent of certain tolls which he had hired, it was decided that no action for the rent could be supported in the name of the treasurer, the contract being in legal contemplation with the commissioners and to pay them.

Whether this suit should have been brought in the name of the district trustees, or whether it should have been brought on the official bond of the township treasurer for their use, we are not now required to determine. We are satisfied that this suit can not be maintained by the present plaintiff, and that the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

A. Kennedy, for the plaintiff.

J. Brownlee, for the defendant.

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*WINN v. BURT, on Appeal.

IN a suit by *scire facias* against replevin-bail, the proceedings in the previous suit against the principal are no part of the record.

GRAVES v. CLARK.

PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT.—In a suit on a promissory note payable on demand, brought by the payee against the maker, it was held that parol evidence of the plaintiff's declaration at the time the note was executed, that payment of it was not to be demanded until after his death, &c., was inadmissible.(a)

ERROR to the *La Grange* Circuit Court.

SULLIVAN, J.—Assumpsit on a promissory note payable on demand. The defendant pleaded, 1st, non assumpsit; and, 2d, a special plea which tendered an immaterial issue. Verdict and judgment for the defendant.

At the trial, the defendant offered the following testimony which was objected to by the plaintiff; that at the time of the execution of the note mentioned in the declaration, the plaintiff declared that the amount for which the note was given was advanced by him to the defendant, who was his son-in-law, and was not to be demanded until after his death, nor then, unless the amount received by defendant, as his share of the plaintiff's estate, should be greater than the amount received by the other children of the plaintiff, or unless the plaintiff should become insolvent. The Court overruled the objection to the testimony and admitted it, to which the plaintiff excepted.

The admission of the testimony was a departure from the rule which disallows parol testimony to contradict, vary, or add to a written instrument. The note purports to be payable on demand, and the effect of the testimony was to show that it was not so payable, but that it was to be paid only on a future and contingent event. This would be to destroy the written contract, and substitute a different one in its place.

[*184] The following cases are in point. *Hoare v. Graham*, *3

Camp., 57; *Free v. Hawkins*, 8 Taunt., 92; *Woodbridge v. Spooner et ux.*, 3 B. & Ald., 233; *Thompson v. Ketcham*, 8 Johns., 189; *Tisloe v. Graeter*, 1 Blackf., 353.

(a) *Burns v. Jenkins*, 8 Ind., 417.

Cook v. Hedges.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Howe, for the plaintiff.

D. H. Colerick and *W. H. Coombs*, for the defendant.

COOK v. HEDGES.

PLEADING IN JUSTICE'S COURT.—When a written contract between the litigating parties is filed as the cause of action in a justice's Court, the want of an averment of extraneous facts connected with the contract, and necessary to be proved on the trial to sustain the action, is not a fatal objection, if enough be stated to bar another suit for the same demand.^(a)

ERROR to the *Allen* Circuit Court.

DEWEY, J.—*Cook* sued *Hedges* in debt before a justice of the peace. The cause was taken by appeal to the Circuit Court. The cause of action filed before the justice was the following writing, signed by the defendant: "Mr. *James Cook*, I will pay you for Mr. *William Roberts* \$22.50, out of the first draft I may receive from the post office department; the money shall be taken out of the drafts sent on against the postmaster at *Goshen*." On motion of the defendants, the Circuit Court dismissed the suit, at the plaintiff's costs, for want of a sufficient cause of action.

We think the decision was erroneous. The cause of action, agreeably to decisions heretofore made by this Court, is sufficient to put the defendant on his defense. When a written contract between the litigating parties is filed as the cause of action in a justice's Court, the want of the averment of extraneous facts connected with the contract, and necessary to be proved on the trial to sustain the action, is not a fatal objection, if enough be stated to bar another suit for the same demand. *Denby v. Hart*, 4 Blackf., 13; *Vandagriff* [*185] v. **Tate et ux*, *Ib.*, 174; *Wiley v. Shank*, *Ib.*, 420;

(a) *Harper v. Pound*, 10 Ind., 32

Reese v. Bolton.

Evans v. Shoemaker, 2 Blackf., 237. We think the cause of action in this case is of that character.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. Johnson, for the plaintiff.

H. Cooper, for the defendant.

REESE v. BOLTON.

TRESPASS—PLEADING—PRACTICE.—Trespass for an assault and battery.

Plea, *son assault demesne*. Replications, 1st, *De injuria*; 2d, *Excess*. The defendant having moved that the second replication be set aside, the Court gave the plaintiff leave to select which replication he would retain. The plaintiff refused to make the selection, and the Court granted the motion. Held, that there was no error in this proceeding.

Held, also, that the plaintiff had no right, on the trial of said cause, to ask a witness whether, in his opinion, the fight would have occurred, if the defendant had informed the plaintiff that he had a knife.(a)

APPEAL from the *Delaware* Circuit Court.

DEWEY, J.—Trespass, assault and battery. Plea, *son assault demesne*. The plaintiff replied, 1, *De injuria*, &c.; 2, *Excess*. The defendant moved to set aside the second replication; and the Court, having offered to leave it optional with the plaintiff which replication he would retain, and the selection being refused, granted the motion. Issue upon the first replication. Verdict and judgment for the defendant.

It is contended that setting aside the replication, upon motion, was erroneous; that the objection of duplicity could be raised only by special demurrer.

A demurrer, doubtless, would have been the more regular practice. But as in this form of action, the plaintiff could prove *excess* under the first replication; and as he himself first violated correct practice by replying doubly, and then refused

(a) *Philbrick v. Foster*, 4 Ind., 442.

Butler, Assignee, v. Sturges.

to select between the two replications, we do not deem the decision of the Circuit Court in setting aside the second replication to be a matter of error. This Court has [*186] repeatedly *decided, that the rejection, on motion, of a special plea amounting to the general issue, when a formal general issue was also pleaded, was no cause for reversing a judgment. *Sinard v. Patterson*, 3 Blackf., 353; *Rhoden v. Graham*, 4 Blackf., 517.

On the trial, a witness for the defendant, having given to the jury an account of the conflict, and of the altercation between the parties which led to it, was asked by the plaintiff to state his opinion, whether "the fight would have taken place at all, if the defendant had informed the plaintiff (who had previously demanded to know), whether he (defendant), had a knife?" This testimony, being objected to, was excluded by the Court; and we think very correctly.

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman, for the appellant.

BUTLER, Assignee, v. STURGES.

ASSIGNMENT OF NOTE FOR COLLECTION.—To a suit on a promissory note, brought by the assignee of the payee against the maker, the defendant pleaded that the note was assigned for collection only, the proceeds to be credited on certain notes given by the assignor. *Held*, that the plea was insufficient.

APPEAL from the *Allen* Circuit Court.

BLACKFORD, J.—Assumpsit on several promissory notes, brought by the assignee of the payee against the maker. Pleas, 1st, *Nil debet*; 2d, Payment; to the first of which the *similiter* was added; and to the second, there was a replication in denial.

There was a third plea in bar as follows: *Actio non*; the notes were assigned to the plaintiff for the purpose of collection

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only; the proceeds being intended to be credited on certain notes executed by the assignor to *Hanna* and *Vermilya*, and left in the hands of the plaintiff and his partner for collection, &c. To this plea there was a general demurrer.

The issues on the first and second pleas were found for the plaintiff. The demurrer to the third plea was over-
[*187] ruled, and *the plaintiff refusing to withdraw the demurrer and reply, final judgment was rendered for the defendant.

There can be no doubt but that the third plea is bad. It admits the assignment, but says that the assignee was to collect the money, and apply the proceeds to the payment of a debt of the assignor. The *legal* interest of the note, according to the plea, was in the plaintiff, and that authorized him to sue on the note in his own name. What disposition was to be made of the money after it was collected is another affair, with which the mere right to sue on the note has no connection.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the appellant.

ARNOLD v. MAUDLIN and Another.

JOINDER OF COUNTS.—Counts in trespass *quare clausum fregit*, and for an assault and battery, may be joined.

ERROR to the *Washington* Circuit Court.

BLACKFORD, J.—This was an action of trespass. Three counts; the first of which is for breaking the close; the second and third for an assault and battery. General demurrer to the declaration, and judgment for the defendants.

The only objection made to the declaration is, that there is a misjoinder of counts. This objection is without foundation. Several trespasses, as assault and battery, false imprisonment,

 Andre v. Johnson.

and trespasses upon property either real or personal, may all be joined. Gould on Plead., 212.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. G. Dunn, for the plaintiff.

J. W. Payne, for the defendants.

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*ANDRE v. JOHNSON.

REPLEVIN—PLEADING.—If in an action of replevin commenced before a justice of the peace, the affidavit filed be such as the statute on the subject requires, no other statement of the demand is necessary.^(a)

APPEAL from the *St. Joseph* Circuit Court.

BLACKFORD, J.—This was an action of replevin, commenced before a justice of the peace, for unlawfully detaining a mare. The plaintiff filed such an affidavit as is required by the statute regulating the action of replevin. Rev. Stat., 1838, p. 372. Pleas, 1, Property in the defendant; 2, That the mare had been taken up under the estray law, &c. Verdict and judgment before the justice for the plaintiff.

The defendant appealed to the Circuit Court. Motion by the defendant to dismiss the suit on account of the insufficiency of the cause of action. Cause dismissed.

We think the affidavit (the suit being commenced before a justice of the peace) shows the cause of action with sufficient certainty.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles and *J. A. Liston*, for the appellant

J. L. Jernegan and *J. D. Defrees*, for the appellee.

(a) *Dunn v. Crocker*, 22 Ind., 324.

Layman v. Waynick.

BARGER and Others v. THE STATE.

GRAND JURORS.—Grand jurors can only serve for one year from the time they are selected.

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—Indictment for malicious trespass. Plea in abatement, that the grand jurors who found the indictment had been selected by the board doing county business, more than one year before the first day of the term of the Circuit Court at which the indictment was found. General demurrer to the plea, and the demurrer sustained. Plea, not guilty. Verdict and judgment for the State.

We think the demurrer to the plea in abatement [*189] should *have been overruled. According to the statute, grand jurors can only serve for one year from the time they are selected. Rev. Stat., 1838, p. 358.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. J. Peaslee, for the plaintiffs.

H. O'Neal, for the State.

LAYMAN v. WAYNICK.

OYER.—Oyer of the writ (if in any case demandable) can not be craved after the day on which the cause is first set for trial.

APPEAL from the *Putnam* Circuit Court.

BLACKFORD, J.—*Waynick* brought an action of assumpsit against *Layman* and another. The writ was served on *Layman*, and returned "not found" as to the other defendant. The record states that the plaintiff and *Layman* appeared by their attorneys. The cause was docketed, and stood for trial on the second day of the *April* term, 1841, being the first term

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after the declaration was filed. It was called on that day, and *Layman* failing to plead, a rule was taken against him to plead on the next day on the calling of the cause. On the next day, the parties appeared, and, by agreement, the cause was continued until the sixth day of the term. It was called again on the sixth day, when *Layman* craved *oyer* of the writ, which was refused. Judgment against *Layman* for want of a plea.

The refusal to grant *oyer* of the writ is the error assigned.

If a defendant has a right to *oyer* of the writ in any case, it is only with a view to his pleading in abatement, or moving to quash the writ. The time for such plea or motion is limited, by statute, to the day on which the cause is first set for trial. *Freeman v. Hukill*, 4 Blackf., 9; Rev. Stat., 1838, p. 449. That day, in the case before us, was the second day of the term. The *oyer* in question, therefore, which was not craved by *Layman* until the sixth day of the term, could have been of no use to him had it been granted.

[*190] **Per Curiam*.—The judgment is affirmed, with six per cent. damages and costs.

E. W. McGaughey, for the appellant.

J. Cowgill, for the appellee.

BRADLEY v. WARD and Others.

LAW-MERCHANT--PLEADING.—Debt by *A*, indorsee of *B*, against *C* as surviving partner of the firm of *C* and *D*, on a promissory note executed in the name of the firm, and payable to the indorser. The note was executed and made payable in the State of New York, where it was negotiable by the law-merchant, and was indorsed before it was due.

Pleas, 1, The general issue; 2, That before the indorsement, and before the note was due, *C* and *D* executed other promissory notes to the payee, which the latter accepted in full satisfaction and payment of the note sued on.

Held, on general demurrer to the second plea, that, by the law-merchant, which governed the case, that plea, assuming it to be valid in other respects, was insufficient for not alleging that, before the indorsement, the plaintiff had notice of the payment. *Held*, also, that under the first plea, proof of the death of *D* was not necessary to sustain the suit.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—*Ward* and others sued *Bradley*, surviving partner of the firm of *Bradley* and *Wells*, in debt. The action is founded on a promissory note, dated *August* the 1st, 1836, executed by *Bradley* and *Wells* in the name of the firm, by which they promised to pay to the order of the firm of *Wells, Vandervoort & Co.*, a certain sum of money in twelve months. The declaration sets out the note, and avers a transfer of it by the payees to the plaintiffs on the day of its date. It also alleges that the note was made in *New York*, and payable there; that, by a statute of that State, (which is specially set forth), promissory notes payable to any person, or order, are governed by the law-merchant like inland bills of exchange. The defendant pleaded, 1, *Nil debet*; 2, That on the 17th of *February*, 1837, and before the indorsement of the note to the plaintiffs, *Wells* and *Bradley* executed to *Wells, Vandervoort & Co.*, other promissory notes, which they received and [*191] accepted in full satisfaction *and payment of the note which is the foundation of the suit. To this plea the plaintiffs demurred generally, and the Court sustained the demurrer. On the trial of the general issue there was judgment for the plaintiffs.

It is contended that the Circuit Court erred in sustaining the demurrer.

The contract alleged in the declaration having been made in *New York*, where it was also payable, must be subject to the law of that State. The demurrer admits the prevalence of the law-merchant in *New York* in reference to promissory notes like the one in question. It is a well settled rule of that law, that the *bona fide* holder for value of negotiable paper, transferred to him before maturity, can not be affected by the prior transactions of the original parties, unless the instrument be void at its inception. A note, negotiable by the law-merchant indorsed before it is payable, though it may have been previously paid, is a valid instrument in the hands of a fair holder for a valuable consideration; such payment can not be set up by the maker in defense of an action against him brought by

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an indorsee without notice. *Burbridge v. Manners*, 3 Campb., 193; Chitt. on Bills, 242; Bayley on Bills, 144; *Dodd v. Edwards*, 2 C. & P., 602.

The plea under consideration alleges that the note described in the declaration, was paid or satisfied by the makers to the payees before they indorsed it to the plaintiffs; but it shows that the payment or satisfaction was made before maturity, and it does not allege notice of the payment to the plaintiffs. This omission is fatal even allowing the plea to be good in other respects. The demurrer was correctly sustained.

It is also contended that on the trial of the general issue, the plaintiffs failed to prove the death of *Wells*, one of the partners who made the note; and that, therefore, there should have been a nonsuit. We think the evidence sufficient to establish the death of *Wells*; but were the fact not so, it could not avail the plaintiff in error. That a joint contractor is omitted as a defendant, though the record show the cause of action to be joint, is no ground of a nonsuit; nor would proof of the omission, if it should not appear by the record, bar the [*192] action under the general issue. *South v. *Tanner*, 2 Taunt., 254; *Dillon v. The State Bank*, November term, 1841.(1)

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. Pettit, for the plaintiff.

A. Ingram and Z. Baird, for the defendants.

(1) Ante, p. 5; *Wilson v. The State*, post.

 ROCK v. GORDON and Another.

DEMURRER—PRACTICE.—If some of the breaches, assigned in a declaration in debt on bond conditioned for the performance of covenants, be good and the others not, a demurrer to the whole declaration must be overruled.

APPEAL BOND—PLEADING.—Declaration in debt on a bond conditioned to prosecute, with effect, an appeal from the judgment of a justice of the peace.

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Breaches, 1, That the appellant wholly failed to prosecute the appeal. 2, That he failed to cause a transcript of the judgment to be filed in the clerk's office within twenty days after taking the appeal. 3, That he did not prosecute the appeal with effect, but, on the contrary, the appeal was dismissed because the transcript of the judgment was not filed in the clerk's office within twenty days, &c. *Held*, on general demurrer, that the first and third breaches were good, and the second bad.

ERROR to the *Posey* Circuit Court.

SULLIVAN, J.—*Rock* brought an action of debt against *Gordon* and another on a bond with a condition annexed, that if *Gordon* should prosecute with effect an appeal from the judgment of a justice of the peace in favour of *Rock* against *Gordon*, the bond should be void. The breaches were assigned in the declaration as follows, viz.: 1, That *Gordon* wholly failed, refused, and neglected to prosecute said appeal at the said term when, &c., or at any other time. 2, That he failed and neglected to cause a transcript of the judgment in said condition mentioned, to be filed in the clerk's office of the county within twenty days after taking said appeal. 3, That he did not prosecute said appeal with effect, but, on the contrary, said appeal was dismissed by the Circuit Court, because the transcript of the judgment so appealed was not filed in [*193] the clerk's office within twenty days, *&c. General demurrer and joinder, on which the Court gave judgment for the defendants.

In an action on a bond with a condition, it is the plaintiff's privilege to assign as many breaches as he may think proper. The breaches so assigned are in the nature of so many counts, and if either of them be good, a general demurrer to the declaration should be overruled.

We think the first breach is well assigned. We understand the averment to be, that *Gordon* having prayed an appeal and entered into bond, wholly neglected to take further steps in prosecuting it to effect. This is sufficient. *Dias v. Freeman*, 5 T. R., 195.

The third breach is also well assigned. It can not be distinguished in principle from the case of *Wood v. Thomas*, May term, 1841, where it was held that a bond with a condition to

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prosecute an appeal with effect, was broken by an irregularity which caused the appeal to be dismissed.

The second breach is not well assigned. The transcript referred to may not have been filed within the twenty days prescribed by the statute, and no advantage taken of the omission. For aught that appears in that breach, the cause may have been tried, and the appeal prosecuted to a successful termination.

As the first and third breaches are sufficient, the demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pitcher, for the plaintiff.

STANLEY v. BRANNON and Others.

ADVANCEMENT.—If a father purchase real estate with his own money in the names of his children, the purchase is an advancement to the children, and not a resulting trust for the father.(a)

FRAUDULENT CONVEYANCES—SUBSEQUENT PURCHASER.—Such a purchase is not within the statute against fraudulent conveyances; and, therefore, a subsequent purchaser, though *bona fide*, will not be relieved against it. But if such purchase were within the statute, still a subsequent purchaser *with notice* could not take advantage of it.(b)

[*194] *SAME.—If a subsequent purchaser from the father in such case, obtain a decree for the land against the father and the children, the decree saving to the children, who are infants, the right to show cause against it when they come of age, and such purchaser afterwards sell the land to a third person, the circumstances, that the latter's purchase was made whilst the decree was in force, will not, even though his purchase was *bona fide*, prevent the children, when they come of age, from having the decree and his conveyance set aside.

BLACKFORD, J.—This is a bill in chancery certified from the *Randolph* Circuit Court. The object of the bill is to correct a

(a) *Woolery v. Woolery*, 29 Ind., 249; 8 Ind., 364; 3 Ind., 558.

(b) *Paine v. Doc*, 7 Blackf., 485.

mistake in a title-bond as to the description of the land, and to obtain a specific performance of the contract.

The bill states that the complainant, in 1833, bought of *John A. Brannon*, one of the defendants, a certain tract of land, paid part of the purchase-money at the time, and gave his notes for the residue; that the complainant took from the vendor a bond, conditioned for a title on payment of the purchase-money; that there is a mistake in the condition of the bond as to the description of the land; that the complainant took possession of the land intended to be purchased, made improvements, and continues in possession; that he has paid the purchase-money and demanded a deed which was refused. The bill also states that, long before the said purchase, the vendor paid for the land, at the land office, with his own money, and, to defraud the complainant, took the certificate for the land in the names of the other defendants, his infant children, in whose names the patent has issued; that the vendor concealed from the complainant the fact that the title was in the names of the children; and that *Brannon*, the vendor, is insolvent. Prayer that the mistake may be corrected; and that the vendor and his infant children may be decreed to convey, &c.; or that the purchase-money be refunded, &c.

A guardian *ad litem* answered for the infants in the usual form; and the other defendant made default. The cause was submitted to the Court upon an exhibit and depositions. The complainant obtained a decree for a conveyance of the land, saving to the infants the right to show cause against the decree when they should come of age, &c.

Afterwards, in 1838, two of the defendants, who [*195] were *infants when the decree was rendered, on coming of age, filed a new and further answer to the bill.(1) This answer denies that the father of these defendants paid his own money for the land, or that he concealed from the complainant that the certificate was in the names of the children, and avers that the complainant, before his purchase, knew that the certificate was in their names. This answer also states that, since the decree, the complainant, with intent

to defraud these defendants, had sold the land to one *Hutchins* who had notice of the defendant's title. Prayer that *Hutchins* be made a party, that the sale to him be set aside, and for general relief.

Hutchins filed an answer admitting his purchase, but alleging that it was for a valuable consideration, and without notice of the defendant's claim. He states that he gave his notes for the purchase-money which have not been paid.

The cause, at this stage, was certified to this Court, and several depositions have since been taken.

It is clearly proved that the complainant, *Stanley*, had full notice, at the time of his purchase, that the certificate for the land was not in the name of the vendor, but in the names of his infant children. Some of the witnesses told *Stanley*, before his purchase, that the title was in the names of the vendor's children. *Stanley* answered that he did not care for that, as the father had promised him that the children, when they should come of age, would make him, *Stanley*, a deed for the land. It even appears that, before the purchase, the vendor had shown *Stanley* the certificate for the land, which was in the names of the children. It was also proved, that *Hutchins* had notice of the situation of the title before his purchase from *Stanley*. There is also some evidence tending to show, that the land was paid for with money received by the father from the sale of land, which had been conveyed to his wife, the mother of the children, before her marriage.

If it be considered that the father, *John A. Brannon*, paid for the land in dispute with his own money, still no trust in his favour resulted from that circumstance. The purchase, in that case, must be viewed as an advancement to the children,

and not as creating a resulting trust for the father.

[*196] 2 *Sugd. on Vend., 141. It is decided that such a gift is not within the statute of 27th of Eliz., against fraudulent conveyances, and that therefore a subsequent purchaser, though *bona fide*, will not be relieved against it. *Lady George's case*, 3 Cro., 550, cited; 2 Sugd. on Vend., 146. And if such gift be not within the *English* statute, it can not be

within ours, the statutes being substantially the same. Rev Stat., 1838, p. 225. But if such gift were within the statute, the complainant, in the case before us, could not take advantage of it, because he had notice, before his purchase, that the certificate was in the names of the children. He was not therefore a *bona fide* purchaser, and can not claim the benefit of the statute. We are aware that this is not the *English* doctrine, but it accords with that of the Supreme Court of the *United States*. *Cathcart et al. v. Robinson*, 5 Peters, 264.

It is evident, therefore, that the complainant has no claim to a conveyance of the land. If he has any right to damages for a breach of the condition of the bond, he must have recourse to an action at law.

The defendants who filed the new answer made *Hutchins* a party, and put interrogatories to him, by virtue of the statute regulating the practice in chancery. *Hutchins* relies upon the circumstance, that his purchase was made after the decree in favour of his grantor's title, and whilst that decree was in force. We give no opinion as to the law, where a complainant having obtained a decree against defendants who are all adults, sells the land, and the decree is afterwards reversed, that not being the case now before us. Here all the defendants but one were infants when the decree relied on by *Hutchins* was rendered; and the right of the infants to show cause against the decree when they should come of age was expressly saved by the decree. Such a decree, at all events, can be no protection even to a *bona fide* purchaser from the complainant, where the infants, under the right reserved, cause the decree to be set aside.

We are of opinion that the former decree in this cause must be set aside, and the suit, so far as *Stanley* is concerned, be dismissed for want of equity. We are also of opinion, that the conveyance to *Hutchins* is void

[*197] *Decree accordingly for the defendants, with costs.

G. B. Tingley, for the complainant.

J. Smith and *J. S. Newman*, for the defendants.

(1) Where a decree has been made against an infant defendant, who put in

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the common answer by his guardian, the general rule is, that such defendant, on coming of age, has the privilege of putting in a new answer stating a different case, and of going into evidence in support of that case.

But foreclosure suits are not within the rule. An infant may be foreclosed, and can not, in showing cause, travel into the account, but can only show error in the decree. *Kelsall v. Kelsall*, 2 *Mylne and Keene*, 409.

VANDEVENDER and Another v. PITTSFORD.

PLEADING—VARIANCE—Declaration in debt on a sealed note for the payment of a certain sum of money at a future day with interest, the note stating that if the interest were not punctually paid annually, the principal to be immediately payable; averment, that a year's interest was due and unpaid, wherefore, &c. The note, as shown on *oyer*, agreed with the description of it in the declaration, except that it set out the consideration, which was a certain tract of land, and stated that if the interest were not punctually paid annually, *or the obligor should sell the land before the note fell due*, the note was to be immediately payable.

Held, that the variance was not material, and that the declaration—the note being considered a part of it—was substantially good.

ERROR to the *Madison* Circuit Court.

BLACKFORD, J.—*William Pittsford* brought an action of debt against *Lewis Vandevender*, *Sandford Cockrell*, and *Philip Vandevender*. The debt claimed is \$660. There are two counts in the declaration.

First count: For that whereas the defendants, on the 4th of *March*, 1840, at, &c., by their certain writing obligatory sealed, &c., acknowledged themselves to be jointly and severally bound to pay to the plaintiff the sum of \$400, on or before the 1st of *January*, 1848, drawing interest at the rate of ten *per cent. per annum* from the 1st of *January*, 1839, and if the interest were not punctually paid annually as the same

fell due, at the expiration of each year, then and in [*198] that case the whole sum of money aforesaid to *become due and payable to the plaintiff. Averment, that on the 1st of *January*, 1841, there was due and payable in interest as aforesaid, on the said sum of money specified in the said

writing obligatory, the sum of \$40.00, the interest for the year 1840; which sum of \$40.00, or any part thereof, was not paid to the plaintiff by the defendants or either of them, at the time of its falling due, nor before nor since. Second count: For that whereas, also, the defendants afterwards, to wit, on the day and year first aforesaid, at, &c., by their certain writing obligatory sealed, &c., acknowledged themselves to be jointly and severally bound to pay to the plaintiff the further sum of \$260, on or before the 1st of *January*, 1848, drawing interest at the rate of ten *per cent. per annum* from the 1st of *January*, 1839, and if the interest should not be punctually paid annually, at the expiration of each year as the same fell due, then and in that case the whole amount of said \$260 was to become due and payable to the plaintiff. Averment, that on the 1st of *January*, 1841, there was due and payable in interest as aforesaid for the year 1840, on said \$260, the sum of \$26.00; which sum of interest was not paid to the plaintiff by the defendants or either of them at the time of its falling due, nor before nor since. Wherefore an action has accrued to the plaintiff to demand and have of the defendants, the sum of \$660, &c., nevertheless, &c. Damage, \$500.

The writ was returned "not found" as to the defendant *Cockrell*. The other defendants having obtained *oyer* of the writings obligatory, filed a general demurrer to each count, setting forth the proper *oyer* in each demurrer.

The *oyer* of the obligation noticed in the first count is as follows: "\$400. On or before the first of *January*, 1848, we or either of us promise to pay *William Pittsford*, the sum of \$400 for value received; it being part of the purchase-money for a certain tract of land, described in a deed made this day by the said *Pittsford* to the said *Lewis Vandevender*; the above money to bear ten *per cent.* interest from the 1st of *January*, 1839.

Now if the said interest be not paid punctually when [*199] due at the expiration of each year, *or the said *Lewis Vandevender* sell the land before the expiration of this note, then and in either case the said note is to come due and payable to the said *Pittsford* or his assigns. *March 4, 1840.*

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Lewis Vandevender, (SEAL.) Sandford Cockrell, (SEAL.) Philip Vandevender, (SEAL.)"

The following is the *oyer* of the obligation mentioned in the second count: "\$260. On or before the first of *January*, 1848, we or either of us promise to pay *William Pittsford* or order, the sum of \$260; it being part of the purchase-money for the E. half of the S. W. qr. of sec. 19, T. 19, R. 8 E.: the said sum of money to bear ten *per cent.* interest from the first of *January*, 1839. Now should the interest on said note not be paid when due at the expiration of each year, or should the said *Lewis Vandevender* sell the said land, then and in that or either case the said sum of \$260 comes due and payable to the said *Pittsford* or his assigns. *March 4, 1840. Lewis Vandevender, (SEAL.) Sandford Cockrell, (SEAL.) Philip Vandevender, (SEAL.)*"

The demurrers were overruled, and judgment rendered for the plaintiff against the defendants, who demurred, for the sum of \$660 debt, and \$72.86 damages, for the detention thereof—making together \$732.86, besides costs.

It is clear that the counts were unobjectionable on demurrer, before the bonds were set out on *oyer*; but it is contended, that, on the bonds being thus set out, it appears that the counts are substantially bad.

If the defendants, without setting out on *oyer* the bond mentioned in the first count, had pleaded *non est factum*, we do not think the bond could have been objected to as evidence on the ground of variance. It was not necessary that the count should show the particular consideration of the bond, though it appears on the face of the bond. *Swallow v. Beaumont*, 2 Barn. & Ald., 765. Neither do we think the plaintiff was bound to set out the clause in the bond, relative to the effect of *L. Vandevender's* selling the land, &c. The obligation was complete without that clause, and could not, in any event, be [*200] lessened by it. And the omission in the *count of these parts of the bond, is the only objection made to the count on the ground of variance.

But the true question presented by the demurrer to the first

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count is this, Does the count (the bond being considered a part of it) contain substantially a good cause of action? We think it does. The bond set out on *oyer* shows no matter of objection or answer to the plaintiff's case, as it appeared in the first count before the *oyer*. Stephen on Pl., 71. The omissions in the count, to which we have referred, do not change the sense of the obligation as shown on *oyer*, so as to affect the validity of the breach assigned. *Snell v. Snell*, 4 Barn. & Cress., 741.

The demurrer to the first count was, therefore, correctly overruled.

It is not necessary to notice particularly the objections to the second count. There is no objection to that count which is not applicable to the first.

Per Curiam.—The judgment is affirmed with costs.

H. Brown and W. Quarles, for the plaintiffs.

C. Fletcher, O. Butler, and S. Yandes, for the defendant.

REYNOLDS, Assignee, v. SMITH and Another.

VENDOR AND PURCHASER—CONTRACT TO CONVEY.—*A* executed a promissory note to *B*, in consideration that the latter would convey to him, by a deed with full covenants, a certain tract of land. By virtue of an execution on a judgment existing against *B* at the time of the contract, the land was subsequently sold by the sheriff to *C*; and after such sale on execution, *B* and wife executed to *C* a deed with general warranty for the land. Afterwards, deeds for the land to *A*, by *B* and wife with full covenants, and by *C* and wife with covenants against *C* and those claiming under him, were tendered to *A*, and payment of the note demanded. *Held*, that *A* was not bound to accept the deeds and pay the note.(a)

APPEAL from the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Debt by *Reynolds*, assignee of *Patton*, against *Joseph and Edward Smith*, on a promissory note.

Pleas, 1, *Nil debent*; 2, That the note mentioned [*201] in the *declaration was given by the defendants to

(a) *Mix v. Ellsworth*, 5 Ind., 517.

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Patton, the assignor of the plaintiff, in consideration that he would convey to the defendant, *Joseph Smith*, by a good and sufficient deed in fee-simple, free from all incumbrances, two tracts of land in the plea described; that said tracts of land were at the time when, &c., greatly incumbered, &c., so that *Patton* has been wholly unable to comply with said contract, and has failed to convey, &c.; wherefore the consideration for said note had failed. The plaintiff added the *similiter* to the first plea, and, to the second, replied that the consideration had not failed as stated, &c. Verdict and judgment for the defendants.

The facts were, that the note was given in part consideration of the lands described in the plea; that, at the time of the contract, there was judgments against *Patton* to a large amount in the Circuit Court of the county within which the lands lay; that they were afterwards sold on execution to satisfy said judgments, and were purchased by *R. A. Lockwood*; that, after the purchase by *Lockwood*, *Patton* and wife conveyed the same lands to him in fee by deed of general warranty. It further appeared that previous to the commencement of the suit, a deed for the lands with full covenants from *Patton* and wife to *Joseph Smith*, and a quit claim deed from *Lockwood* and wife with covenants, &c. as to *Lockwood* and persons claiming under him, were tendered to *Smith*, and payment of the note demanded; that, at the time of tendering said deeds, there was a recognizance of record in the *Tippecanoe* Circuit Court, entered into by *Lockwood* as bail for the appearance of another, who stood indicted in said Court, &c., and that *Lockwood* was the owner of other real estate more than sufficient to satisfy said recognizance.

The Court instructed the jury, that at the time of the tender of the deeds from *Patton* and *Lockwood*, the incumbrances upon the land were such as to excuse the defendant, *Joseph*, from accepting the deeds. To this instruction the plaintiff excepted.

The point which was mainly considered in the Circuit Court was, whether the recognizance, to which *Lockwood* was a party, so incumbered the land offered to be conveyed by him, as to

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justify the defendant in refusing his deed. However [*202] this point may be decided, there is a question *behind it which should be first settled, as it involves the merits of the plaintiff's case.

There is no controversy between the parties as to the facts of the case. At the time of commencing the suit, and at the time of the trial, the plaintiff's assignor had no title, legal or equitable, to the land. Notwithstanding the tender of a deed by *Patton* to the defendant, it is conceded that at the time of the tender, the land described in the deed had not only been sold on execution, but that *Patton* and wife had conveyed it by general warranty deed to *Lockwood*, the purchaser at the sheriff's sale. *Patton*, therefore, had no interest whatever in the land. The title had passed from him and had vested in another person. In this state of things, we think the defendant was entirely justifiable in withholding the purchase-money and refusing the deed. *Patton* having no title to the land, could convey none.

But the plaintiff insists, that the deed from *Lockwood* and wife, and the deed tendered by *Patton*, taken together, constituted such a title to the land as the defendant was bound, under the contract, to accept. We have already seen that the deed tendered by *Patton* to the defendant was of no avail. Whether the deed from *Lockwood* conveyed a good title to the land or not, the defendant was not bound to inquire. He had made no contract with *Lockwood* for the purchase of the land, nor with *Patton* for a conveyance from *Lockwood*. His agreement was to pay the money for which the suit was brought, in consideration of a deed, with full covenants, to be made by *Patton*. Such a title as he contracted for he had a right to demand, secured by the covenants of the vendor, and free from blemish. The terms of the contract would be essentially varied if a third person, without consent, were substituted to do that which one of the contracting parties had bound himself to perform.

It is therefore of little consequence to the merits of this cause, to inquire whether the recognizance referred to in the

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bill of exceptions be a lien on the lands of *Lockwood* or not, as the settlement of that question can in no wise affect the decision of the case.

We are of opinion that the instructions of the Court were correct, and that the judgment should be affirmed.

[*203] **Per Curiam*.—The judgment is affirmed with costs.

R. A. Lockwood, for the appellant.

W. M. Jenners and *R. A. Chandler*, for the appellees.

THOMAS v. WILSON and Another.

RELEASE.—An absolute release “of all demands whatever,” executed by the plaintiff to the principal obligor of a replevin bond, on which the suit was brought, is a discharge of the bond.

SURETY.—In debt on such a bond against the principal and surety, the latter let judgment go by default, the former pleaded an absolute release, and, on demurrer to his plea, obtained judgment. *Held*, that the plaintiff could not have damages assessed against the surety.

ERROR to the *Warren Circuit Court*.

SULLIVAN, J.—Debt by *Thomas* against *Wilson* and *Etnire* on a replevin bond. *Wilson*, the principal in the bond, appeared, and pleaded a release executed to him by *Thomas*. *Etnire* made default, and an interlocutory judgment was taken against him. The plaintiff claimed *oyer* of the release set up in the plea, and demurred. The Court overruled the demurrer, and gave judgment for the defendants.

The objection urged against the plea is, that there is a variance between the release as set forth in the plea, and that shown upon *oyer*. There is no ground for this objection. The release is general as well as special. It extends to “all demands whatever” in the first place, and then refers specially to the claim of *Thomas* against *Wilson* on a replevin bond, then in suit in the *Warren Circuit Court*. Whether that bond be the same on which the present suit against *Wilson* and *Etnire* is founded or not, can in no wise affect the case. The release, in general

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terms, of "all demands," in favour of *Thomas* against *Wilson*, will embrace the bond which is the foundation of this suit, unless it appear, by recital or otherwise, that it was the intention of the parties to restrict it to a particular case. But as this no where appears, the Court was clearly right in overruling the demurrer.

After the Court had pronounced judgment on the [*204] demurrer, *the plaintiff moved the Court for a jury to assess his damages against *Etnire*. The Court refused the motion, and the plaintiff excepted. In overruling this motion, the Court committed no error. There is no principle better settled, than that an absolute and unconditional release to one of several co-obligors, whether bound jointly, or jointly and severally, operates as a discharge of all the others. Chitt. on Cont., 605; *Cocks v. Nash*, 9 Bing., 341; 2 Saund., 48. And it is equally well settled, that wherever the principal debtor is discharged, the surety is exonerated from his liability. Chitt. on Cont., 419. In either view, the release to *Wilson* discharged *Etnire*, and the plea of *Wilson* inured to his benefit, for the contract being entire, the plaintiff must succeed upon it against all or none. And in such an action, if the plaintiff fail at the trial, upon the plea of one of the defendants, he can not have judgment or damages against the others, who let judgment go by default. *Tuttle v. Cooper*, 10 Pick., 281; Arch. Forms, 339.

Per Curiam.—The judgment is affirmed with costs.

W. M. Jenners and *R. A. Chandler*, for the plaintiff.

R. C. Gregory, for the defendants.

NELSON v. ROBE.

SLANDER—PRACTICE.—In slander for charging the plaintiff, in the presence of "sundry persons," with larceny, the defendant pleaded that he spoke the words in giving testimony as a witness in a certain cause. *Held*, that the defendant might, on the trial, prove what the testimony which he gave was

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Held, also, that the plaintiff, if he meant to proceed for speaking the words on some other occasion than that named in the plea, should have new assigned.(a)

ERROR to the *DeKalb* Circuit Court.

DEWEY, J.—This was an action of slander for charging the plaintiff below, “in the presence and hearing of sundry persons,” with larceny. The defendant pleaded the general issue, and several special pleas; to the latter the plaintiff replied *de injuria*, &c., upon which there were issues. One of the special pleas is, that the defendant spoke the words [*205] *laid in the declaration, in giving testimony as a witness in a certain State prosecution, before a justice of the peace, against the plaintiff for larceny Verdict and judgment for the plaintiff.

On the trial, the defendant offered evidence to prove what the testimony, given by him in the cause named in his plea, had been. On the objection of the plaintiff, the Court rejected the evidence. This, we think, was wrong. The defendant had a right to support his plea; and, indeed, under the general issue, he was entitled, for the purpose of negating malice, to show that he uttered the words, laid to his charge in the declaration, in the character of a witness. 1 Chitt. Pl., 492, 3; Stark. Ev., part 4, 874; *Outler v. Dixon*, 4 Co. R., 14; *Lake v. King*, 1 Saund., 131.(1) To enable him to do so, it might have been necessary for him to prove what his testimony was. The declaration does not specify the occasion on which the words were spoken. It merely says they were uttered in the presence and hearing of “sundry persons.” As the plea showed the defendant had spoken them lawfully in giving testimony as a witness, if the plaintiff could not gainsay the plea, but designed to proceed for speaking the same words on some illegal occasion, he should have new assigned that matter. 1 Chitt. Pl., 636.

The fourth plea tenders an entirely immaterial issue. As the verdict can not stand in consequence of the rejection of the tes-

(a) *Grove v. Brandenburg*, 7 Blackf., 234.

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timony above referred to, that plea is set aside, with leave to the defendant to replead in its place.

One or two points are raised by the record relative to a plea sought to be withdrawn, and to an instruction asked for and refused, which are of no importance, and need not be particularly noticed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. W. Ewing and *R. Brackenridge*, for the plaintiff.

H. Cooper and *T. Johnson*, for the defendant.

(1) A suit does not lie against a witness for speaking slanderous words in giving evidence. *Harding v. Bodman*, Hutt., 11; *Buckley v. Wood*, Cro. Eliz., 230. No allegation contained in articles of the peace exhibited to justices is actionable, it being a proceeding in the course of justice. *Cutler v. Dixon*, 4 Co. R., 14. The exhibiting of a petition to a committee of parliament [*206] is lawful, and no action lies for it, though the matter be false and scandalous. *Lake v. King*, 1 Saund., 131, 132. No presentment of a grand jury can be libelous. 1 Hawk. P. C., 195. Libelous words, spoken or sworn in a Court of justice in a man's own defense against a charge upon him in that Court, are not actionable. *Astley v. Young*, 2 Burr, 807. A barrister is not liable to a suit for words, which were spoken by him as counsel in a cause, and were pertinent to the matter in issue. *Hodgson v. Scarlett*, 1 B. & Ald., 232.

The defense, that the words were spoken in an innocent sense, or on a justifiable occasion, may be proved under the general issue, because it shows the defendant not guilty of the malicious slander charged; as if the words, pertinent to the issue, were spoken as counsel; *Hodgson v. Scarlett*, *supra*; or were spoken in confidence and without malice, as when a master honestly and fairly gives the character of a servant to one who asks it under pretense of hiring him; Bull. N. P., 8; *Weatherston v. Hawkins*, 1 T. R., 110; *Dunman v. Bigg*, 1 Camp., 269, note; or if the words were read as a story out of a history. *Brook v. Montague*, Cro. Jac., 90; or were spoken through concern, or in a sense not defamatory. *Cromwell v. Denny*, 4 Co. R., 12, and note. The rules of pleading, W., 4, do not require the defense of privileged communication to be specially pleaded. *Lillie v. Price*, 5 Adol. Ell., 645.

HAMILTON v. OVERTON and Others.

CONTRACT—LIQUIDATED DAMAGES.—*A* covenanted with *B* to procure and deliver to him, within a limited time, the certificate of third persons to a certain effect, and stipulated that if he failed to do so, he would pay him \$500 liquidated damages. *Held*, that the sum of \$500 was not in the nature of a penalty, but was the measure of damages as agreed upon by the parties.^(a)

ERROR to the *LaPorte* Circuit Court.

DEWEY, J.—*Hamilton* covenanted with *Overton* and others that, within twenty days, he would procure, and deliver to them, the certificate of *Charles L. Trowbridge* and *DeGarmo Jones*, officers of the bank of *Michigan*, bearing their official signatures, to the effect, that there had been shown to them (*Trowbridge* and *Jones*) three notes signed by *Hamilton*, and indorsed by *John N. Hunter* and *R. S. Merrill*, for \$1,587.34 each, dated *July* the 1st, 1840; which notes they (*Trowbridge* and *Jones*) considered good, and such as they would discount at any time when they were discounting notes; and *Hamilton* stipulated, that if he failed in the above undertaking, he would pay *Overton* and others “\$500 liquidated damages.”

[*207] *Overton* and others *brought an action on this covenant, and assigned for breach, the failure to procure the certificate within the specified time, and the refusal to pay the \$500. The defendant pleaded two special pleas, which were correctly decided to be bad upon demurrer; whereupon the Circuit Court rendered final judgment for the plaintiffs for \$500, interest, and costs.

The question raised by the record is, whether the sum of \$500, stipulated in the covenant to be paid for a breach of it, is in the nature of a penalty, or of damages settled and liquidated by the parties?

Courts, not unfrequently, have found difficulty in drawing the line distinctly between penalties and liquidated damages. The intention of the parties must govern the construction of

(a) *Slidabaker v. White*, 31 Ind., 211; 11 Ind., 70; 1 Ind., 431.

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contracts in this particular, as well as in all other respects; and it may be laid down as a general rule, (admitting, however, of some exceptions), that when the covenant or agreement itself denominates a specific sum a penalty, it will be so viewed by those whose duty it is to interpret the contract. *Smith v. Dickenson*, 3 B. & P., 630; *Astley v. Weldon*, 2 B. & P., 346, *per Lord Eldon*; *Taylor v. Sandiford*, 7 Wheat., 13. But several cases have occurred, in which, though the parties themselves have designated the sum to be paid on a breach of covenant as liquidated damages, it has been considered by the Court as a penalty, on the ground that from a view of the whole contract, such must have been the real meaning of the contractors. This is the doctrine where a specific pecuniary payment is secured by a larger sum. *Astley v. Weldon*, *supra*, *per Chambre, J.*; *Fletcher v. Dyche*, 2 T. R., 32. The same principle is applicable to covenants containing various stipulations of different degrees of importance—some for the payment of specific sums, and others sounding in uncertain damages—with a general provision that a large sum shall be paid for a violation of *any* of the stipulations. *Astley v. Weldon*, *supra*; *Kemble v. Farren*, 6 Bing., 141; *Davies v. Penton*, 6 B. & C., 216; *Charrington v. Laing*, 6 Bing., 242. But when a similar provision has reference only to uncertain damages, and has been understandingly made without fraud, it is a matter of contract, with which Courts have no right to interfere, and furnishes the only measure of damages. *Lowe v. Peers*, 4 Burr., 2225

[*208] **Kemble v. Farren*, *supra*; *Dakin v. Williams*, 17 Wend., 447.

In the case before us there is but one covenant; and from its nature, the damages for a violation of it are entirely uncertain; nor does it appear from the record how they could well be ascertained by evidence. The consideration which induced the undertaking is not shown. We know only what the covenant was; that it was broken; and that the parties to it have themselves agreed upon the amount of damages to be paid for its breach. Indeed, it is difficult to conceive, from the facts disclosed, what motive could have influenced the parties in making

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such a contract. Under these circumstances, we do not feel authorized to pronounce that to be a penalty, which it is expressly stipulated shall be liquidated damages.

Per Curiam.—The judgment is affirmed, with one *per cent.* damages and costs.

J. B. Niles, for the plaintiff.

J. W. Chapman, for the defendants.

BROWN v. MCQUEEN.

JURISDICTION.—The Probate Court has no jurisdiction in suits by or against executors, administrators, or guardians, unless the amount in controversy exceed \$50.00, except where a demand against an executor or administrator is filed at *his request*, &c. (a)

SAME.—The want of jurisdiction in such case may be shown under the general issue.

ERROR to the *Bartholomew* Probate Court.

SULLIVAN, J.—This was an action of assumpsit for money had and received, commenced by *McQueen*, guardian, &c., against *Brown* in the *Bartholomew* Probate Court. The damages claimed were \$50.00. Plea, non assumpsit. Judgment for the plaintiff.

The only question necessary to be considered is, whether the Court below had jurisdiction of the case? The act organizing Probate Courts, &c., (Rev. Stat., 1838, p. 173), invests that Court with jurisdiction “in all suits, at law or [*209] in equity *upon all demands or causes of action in favour of or against heirs, executors, administrators, or guardians, where the amount in controversy shall exceed the sum of fifty dollars, &c.”

The Probate Court is an inferior court created by statute, and possesses such jurisdiction only as the statute confers. In suits where the amount in controversy exceeds fifty dollars,

(a) 1 Ind., 451; 7 Id., 519.

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the jurisdiction is conferred; where it does not exceed that amount, it is not conferred and can not be exercised, except in cases where a demand against an executor or administrator is filed *at his request*, pursuant to the provisions of the act entitled an act to amend an act regulating the practice in suits at law. Rev. Stat., 1838, p. 459. In this case, the amount in controversy did not exceed fifty dollars, and the provisions of the last-named act, it is manifest, do not apply to it. The Court, therefore, had no jurisdiction of the case.

The objection to the jurisdiction was made at the trial, and should have been sustained by the Court. Under the general issue, the want of jurisdiction may be shown, and when shown is fatal to the plaintiff's claim. *Thomas v. Winters*, 4 Blackf., 161.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. H. Barbour, for the plaintiff.

A. A. Hammond, for the defendant.

BARTON v. DUNNING and Another.

TROVER.—To sustain trover, the plaintiff must have had, at the time of the conversion, a general or special property in the goods; but it is not necessary that his interest in them should have continued until the commencement of the suit.

ERROR to the *Posey* Circuit Court.

DEWEY, J.—*Dunning* and *Fovel* declared in trover against *Barton* for the conversion of certain property, wherof they were jointly possessed as of their own proper goods [*210] and *chattels. Plea, not guilty. Verdict and judgment for the plaintiffs.

The defendant moved the Court below to instruct the jury, that, to sustain the action, the plaintiffs must have proved themselves jointly interested in the property in dispute, as

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well at the time of the commencement of the suit, as at that of the conversion by the defendant. The Court charged the jury that it was sufficient if the plaintiffs were jointly interested when the conversion took place, and refused the other branch of the instruction asked for. It is contended that this refusal is error.

The gist of the action in trover is the conversion. The remedy must be pursued by a person having had, at the time of the conversion, a general or special property in the chattel converted; and also the possession, or the right to the immediate possession of it. 1 Chitt. Pl., 148. The right of action, founded on the conversion, is not defeated by a subsequent transfer of the right of property. A purchaser under such a sale could not maintain trover for a conversion committed prior to the acquisition of his title. *Horwood v. Smith*, 2 T. R., 750. The Circuit Court committed no error in refusing to instruct the jury, that the plaintiffs, to maintain the action, must have been jointly interested in the property converted at the time of the commencement of the suit.

Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

J. Pitcher, for the plaintiff.

W. T. T. Jones, for the defendants.

FRAZER v. SMITH.

JUSTICE'S DOCKET—EVIDENCE.—After an entry of judgment for the plaintiff on a justice's docket, this statement followed, viz.: "On, &c., comes the defendant and files an appeal-bond, but does not ask an appeal until he further considers the matter." *Held*, that notwithstanding that statement, the defendant might, on appeal, show by affidavits that the appeal was prayed for when the appeal-bond was filed.(a)

[*211] *ERROR to the *Rush* Circuit Court.

(a) *White Water, &c., Co. v. Henderson*, 8 Blackf., 528.

Frazer v. Smith.

BLACKFORD, J.—*Smith* sued *Frazer* before a justice of the peace, and, on the 18th of *November*, 1840, obtained a judgment. There is a statement on the justice's docket, after the entry of the judgment, as follows: "On the 20th of *November*, 1840, comes the defendant and files an appeal-bond, but does not ask for an appeal until he further considers the matter." On the 2d of *March*, 1841, the justice, at the request of the defendant's attorney, sent up to the Circuit Court a transcript of the judgment. The Court, on the plaintiff's motion, ruled the defendant to show cause why the appeal should not be dismissed. The defendant, in answer to the rule, filed two affidavits—one made by himself, and the other by his attorney. These affidavits show that the appeal was prayed at the time the appeal-bond was filed, and that the papers ought then to have been sent to the Circuit Court. The appeal was dismissed.

The question presented by this case is, whether or not the appeal was prayed for within the time prescribed by the statute? and that question must be decided either by the entry on the justice's docket, or by the affidavits, to which we have referred. That part of the justice's entry, which states that the appeal was not requested when the appeal-bond was filed, was not a matter that belonged to the record of the cause, and was therefore not conclusive on the subject. That being the case, extrinsic evidence—such as the affidavits which were introduced—was admissible to show, on the motion before the Court, that an appeal was prayed for, and the time when it was prayed. Considering the affidavits, as we do, to be the proper evidence on the subject, the appeal was proved to have been prayed in time, and it ought not, therefore, to have been dismissed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. B. Tingley and *P. A. Hackleman*, for the plaintiff.

[*212]

*O. WILSON v. THE STATE.

RECOGNIZANCE.—The condition of a recognizance that a person shall appear at the then next term of the Circuit Court, and from day to day, &c., is a condition for his appearance on the first day of the term, and on every other day thereof unless sooner discharged.(a)

SAME—DENIAL OF FORFEITURE.—If the defendant, in *scire facias* on a recognizance, wish to deny the forfeiture of the recognizance, he must plead *null tiel record*.

SAME—NON-JOINDER.—If a *scire facias*, on a recognizance entered into by two persons jointly, issue against one of them only, the omission of the other can only be taken advantage of by a plea in abatement; and the plea in such case must show, that the party not sued is living.

ERROR to the *Henry* Circuit Court.

DEWEY, J.—*Scire facias* against bail. The writ shows a recognizance, regularly taken and recorded, by which one *William Wilson*, the principal, bound himself to the State in the sum of \$400, and one *McCarty* together with the defendant below, the plaintiff in error, the sureties, were jointly bound in the same sum; and which is conditioned, that the principal should “appear before the judges of the *Henry* Circuit Court at the (then) next term thereof, and from day to day, and answer the State of *Indiana* on a charge of grand larceny, and abide the judgment and decision of the Court therein, and not depart without leave, &c.” It also appears that, on the fourth day of the proper term of the Court, the principal and his sureties were called and made default. The *scire facias* is several against the plaintiff in error. Pleas, 1, That the principal did personally appear at the proper term on the fifth day thereof, and continued from day to day, ready to answer the charge against him. 2, That he was never called and required to appear before the *Henry* Circuit Court, and answer the charge of grand larceny, or any other charge. General demurrer to each plea sustained; and judgment rendered against the plaintiff in error for \$400 and costs.

(a) *Fleece v. The State*, 25 Ind., 384.

O. Wilson v. The State.

It is contended that the first plea is good, because the **condition** of the recognizance gave the principal the whole term in which to appear; and that he could not be legally defaulted until about its close. We do not think this construction of the recognizance can be sustained. The condition that the principal should appear at the then next term of the Court, [*213] “and *from day to day, &c.,” is tantamount to an undertaking to appear on the first, and every other day of the term unless sooner discharged. The plea, therefore, that he did appear on the fifth and subsequent days is clearly insufficient. He had previously forfeited his recognizance.

The second plea is not attempted to be vindicated, and is evidently invalid. If the defendant below designed to deny the forfeiture of his recognizance, he should have pleaded *nul tiel record*, for the forfeiture is alleged by the *scire facias* to be of record.

But the plaintiff in error also contends that the judgment in favour of the State is erroneous, on account of the insufficiency of the *scire facias* for the non-joinder of the other recognizor, *McCarty*; and he insists that he can urge this matter under the demurrer to the pleas.

Some of the doctrines which have been established in relation to the joinder of parties seem to be somewhat arbitrary. In actions founded on contract, if any of those living to whom the promise or obligation is made be omitted as plaintiffs, or any to whom it is not made be joined, and the fact appear in the declaration, it is fatal on demurrer, in arrest of judgment, or in error; and if the defect is not shown by the pleadings, it is a ground of nonsuit under the general issue. 1 Chitt. Pl., 13; *Vernon v. Jefferys*, 2 Str., 1146; *Anderson v. Martindale*, 1 East., 497; *Scott v. Godwin*, 1 B. & P., 67. But when the action is by executors or administrators, either on contract or tort, and there is a co-executor or administrator not joined, objection to the non-joinder can be taken only (after *oyer* of the letters testamentary or of administration) by a plea in abatement, that the omitted executor or administrator is living and not made a party. 1 Chitt. Pl., 20; 1 Saund., 291 g, n.

O. Wilson v. The State.

4. The same rule is applicable to all actions founded on tort, though the non-joinder of a person jointly interested with the plaintiff appear of record. 1 Saund., 291 g, h, n. 4. In actions *ex contractu*, if a part only of several joint contractors be sued, and the defendant wish to avail himself of the omission of the others, he must do it by a plea in abatement; if he omit to do so, he can not afterwards urge the objection in any form, though the declaration set out a joint contract. 1 Saund., 154, n. 1; *Rees v. Abbott*, Cowp., 832, *per Buller*, Justice; [*214] *Hawkins v. Ramsbottom*, 6 *Taunt., 179. So, to an action on a specialty, part of the obligors being omitted, the defendant can not have *oyer* and demur; he must still plead in abatement. *Cabell v. Vaughan*, 1 Saund., 291 a, n. 2. The plea in abatement for the non-joinder of a contractor, must show not only that the omission has been made, but that the contractor omitted is living. *Cabell v. Vaughan*, *supra*, Ib., 291 b, n. 4. If, however, the declaration, or other pleading of the plaintiff, expressly show what it would be necessary to aver in the plea, that there are joint contractors who are not joined, and who are living; then the defendant may demur, move in arrest of judgment, or sustain error. 1 Chitt. Pl., 46; 1 Saund., 291 b, n. 4, and the authorities there cited. *Dillon v. The State Bank*, November term, 1841.(1) We are aware that in *scire facias* on a recognizance, and also on a bond to the crown, it has been held, that if the declaration show that a part only of the cognizors or obligors are sued, though it does not appear that the others are living, the non-joinder is fatal on demurrer. *Rex v. Young*, 2 Anstr., 448; *Rex v. Chapman*, 3 Id., 811. Believing these cases to be irreconcilable, in principle, with the decisions which have been made in regard to non-joinder of parties to ordinary contracts, we do not feel disposed to adopt the supposed distinction on which they are founded.

The record before us only shows, that there was a joint recognizor, who is not a party to the *scire facias*; but it does not show that he was living at the commencement of the suit. The Circuit Court, therefore, committed no error in rendering judgment in favour of the State.(2)

Mahan v. Reeve and Others.

Per Curiam.—The judgment is affirmed with costs.

C. B. Smith, for the plaintiff.

H. O'Neal, for the State.

(1) Ante p. 5, Acc. *Bragg v. Wetzel*, Vol. 5 of these Rep., 95.

(2) In the case of a judgment against two, and a suit upon it against one of them only, it has been decided that the declaration, showing the judgment to be joint, and assigning no reason why the omitted party was not joined in the suit, may be objected to on general demurrer or in arrest of judgment. *Gilman v. Rives*, 10 Peters, 298. “

[*215] *MAHAN v. REEVE and Others.

MISTAKE—CHANCERY JURISDICTION.—A sale of land having been made under an order of the Probate Court, on petition for a partition, it was held that a Court of chancery could not correct a mistake, as to the description of the land, in the notice, petition, order of Court, &c.

ERROR to the *Rush* Probate Court.

BLACKFORD, J.—This is a bill in chancery, filed to obtain a decree for correcting a certain mistake in the proceedings of a cause on petition for partition of certain real estate. The mistake is alleged to consist in describing the land in the notice, petition, order of Court for the sale, and the commissioner's report of the sale, as being in section *twenty-eight*, &c., instead of describing it as being in section *twenty-three*, &c.

Demurrer to the bill; demurrer overruled; and a decree for the complainants.

We think this decree is erroneous. No authority is cited, and we know of none, that shows a Court of chancery to have jurisdiction in a case like that described in the bill.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

G. B. Tingley, for the plaintiff.

C. B. Smith for the defendants.

WILLIAMS and Others v. MOOREHOUSE and Others.

DECEDENT'S ESTATE—EXECUTION AGAINST LAND.—If a petition to have execution against the real estate of a decedent, on a judgment against his executor or administrator, do not make the *terre-tenants* defendants, or aver there are none, it is defective; and the defect may be assigned for error.

APPEAL from the *Marion* Circuit Court.

SULLIVAN, J.—*Moorehouse* and others filed a petition in the *Marion* Circuit Court against the administrators, widow, and heirs of *J. B. E. Reed*, deceased, representing that on, &c., they obtained a judgment in the *Marion* Circuit [*216] Court against *the administrators of said *Reed*, upon a debt due to them from the intestate in his lifetime, that they had issued execution against the goods and chattels &c., which had been returned *nulla bona*; that the judgment remained unsatisfied; that there were lands in the county of *Hancock* belonging to the estate of *Reed*, &c.; and prayed the Court to award execution in their favour against said lands. There were two pleas. On the first issue was taken, which was found for the plaintiffs. The second plea was, that there was a *terre-tenant*, &c., one *J. H.*, who was not made a party, &c. General demurrer to the second plea and joinder, on which the Court gave judgment for the petitioners.

The first question to be determined is, as to the sufficiency of the petition.

The statute directs, that no real estate of any testator or intestate shall be subject to execution, upon any judgment against the executor or administrator of such testator or intestate, unless the heirs of such intestate, the devisees of such testator, and the *terre-tenants* of such real estate, be first made parties thereto, &c. Rev. Stat., 1838, p. 284.

The petition before us omits to make the *terre-tenants* parties to the suit. We think it is substantially defective in that particular, or in not giving a reason for the omission, and that the defect may be taken advantage of on writ of error or appeal. If there were no *terre-tenants*, it should have been

The State, on the Relation of Morris, Auditor, &c., v. Johnson and Others

averred, that the Court might have been informed that all persons, whose interests could be affected in any manner, were before the Court. It is a rule, that in all cases where the inheritance or freehold is affected, the tenant of the freehold is to be made a party. 6 Bac. Abr. tit. *scire facias*, p. 113, 114.

In *Welborn v. Jolly*, 4 Blackf., 279, the same construction was put upon a statute in many respects similar to the one under consideration. The *scire facias*, which omitted to make the executor or administrator and the *terre-tenant*, together with the heir, parties to the suit, or show cause for the omission, was held to be insufficient.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

P. Sweetser, for the appellants.

C. Fletcher, O. Butler, and S. Yandes, for the appellees.

[*217] *THE STATE, on the relation of MORRIS, Auditor, &c.,
v. JOHNSON and Others.

COLLECTOR'S BOND—PLEADING.—Debt on the bond of a collector of State and county revenue. Two counts; the first did not name the condition, the second set it out and assigned breaches. Plea of performance, after *oyer*, to the first count, and a replication to the plea, assigning breaches. Special demurrer to the second count, and to the replication.

Held, as to the second count, 1, That an averment that the assessment roll had been returned under oath was unnecessary, it appearing that the assessor had taken an oath of office; 2, That the statute prescribes no time within which the collector's bond should be approved; 3, That an averment, that the alleged acts of the board of commissioners appeared of record, was not necessary.

Held, also, that the replication, which charged that the collector had received the duplicate and precept from the proper officer, had collected a certain amount of State revenue which he had not paid over, &c., and had failed to return the duplicate and precept, was not objectionable because it showed the duplicate to be erroneous, nor because it stated the precept to have the seal of the Circuit Court, instead of that of the board of commissioners.

ERROR to the *Sullivan* Circuit Court.

The State on the Relation of Morris, Auditor, &c.. v. Johnson and Others.

BLACKFORD, J.—This was an action of debt on a bond dated the 11th of *May*, 1839, conditioned that *Johnson* should faithfully discharge his duties as collector of the State and county revenue for that year. The suit is against the collector and his sureties. There are two counts in the declaration. The first is on the bond, without naming the condition. The second sets out the condition and assigns breaches. The defendants, after obtaining *oyer*, pleaded to the first count performance generally. The plaintiff replied to the plea, and assigned breaches. The defendants demurred specially to the replication and to the second count. Judgment for the defendants.

The second count shows the due appointment of an assessor of the State and county revenue for the year 1839; that he was sworn and gave bond according to law; that he made and returned the assessment on or before the first *Monday* of *May*, 1839; that the assessment roll was corrected, and the rate of taxation fixed, as the statute requires; that *Johnson* had been regularly appointed collector of the State and county revenue for that year, and had been sworn *into office; that he had given bond, which was approved by the board of county commissioners at their *June* term, 1839; that the clerk of the county delivered to him a complete duplicate of the assessment roll, and also a precept under the seal of the said board, commanding him to collect and receive the taxes charged in the list of assessment so delivered to him according to law, and to pay over the moneys collected by him by virtue of the precept as required by statute. This count also states that *Johnson*, as such collector as aforesaid, collected from the persons charged on the duplicate, the sum of \$826.67 of State revenue charged against the several persons on the duplicate; that neither the said collector, nor any of the defendants, had paid the said money or any part thereof to the Treasurer of State, but had refused to do so; nor had they or either of them paid the penalty of the bond. It is further stated that the collector had not returned the duplicate and precept delivered to him as aforesaid, with his proceedings thereon, &c.

The following are the causes of demurrer to this count:

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1, It is not stated that the assessment roll was returned by the assessor under oath; 2, The collector's bond could not be approved by the board of commissioners at their *June* term, 1839; 3, It does not appear that the assessment roll was returned by the assessor in time; 4, The acts of the board of commissioners should be averred to appear of record.

The answer to the first objection is, that it is stated that the assessor had taken an oath of office. The second objection may be answered by merely stating, that the statute prescribes no time within which the bond should be approved. There is no ground for the third objection, as it is shown that the assessor did make his return in time. There may be other answers to these three objections, but it is unnecessary to notice them further. The last objection is untenable. Where a judgment of a court of record is the gist of the action, the *prout patet per recordum* is necessary. 1 Chitt. Plead., 404. But that is not the case here. In this case, the bond is the gist of the action, and the acts of the board of commissioners are but inducement; and when that is the [*219] *case, a reference to the record is not required. *Morse v. James*, Willes Rep., 127.

The replication, so far as any question in this cause is concerned, is similar to the second count, except that it states that the assessment roll was examined and corrected by the board of commissioners, and that the precept delivered to the collector, was under the seal of the Circuit Court.

The following are the causes of demurrer to the replication, besides those already noticed in speaking of the second count.

1, Such a duplicate is not shown as authorized the precept. 2, The precept described is defective in its command to the collector. 3, The precept should have the seal of the board of commissioners, instead of that of the Circuit Court.

The first objection is insufficient. The duplicate is said to be imperfect, because the assessment roll returned by the assessor was corrected by the board of commissioners, without the county auditor and assessor. But that is not an objection which the defendants can be permitted to make. The collector is

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charged with having received the duplicate from the proper officer, with collecting under it and the precept a considerable amount of State revenue, and with not paying over the money to the State treasurer, and with not returning the duplicate and precept. It is not for him or his sureties, under these circumstances, to bar a suit on the part of the State for such default, by making the objection in question to the duplicate. If it be admitted, which is the most, surely, that can be asked for the objection, that the duplicate was erroneous, that is no answer to the breaches assigned. Were a sheriff to collect money on an execution, and fail to pay over the money or to return the execution, it would be no defense to a suit on his bond, that the judgment on which the execution issued was erroneous. And that case is not, in principle, dissimilar to the one before us.

The second objection is unfounded. The precept, as to the command contained in it, is conformable to the statute.

We think, also, the third cause of demurrer is not tenable. Although the precept had a wrong seal, it was not for that reason void, but only voidable. It was amendable [*220] by virtue of the statute of 8 Henry the 6, which is in force here, as a mere misprision of the clerk. The collector might have justified under the precept, and he and his sureties are accountable to the State for the State revenue collected by virtue of it, and also for not returning it and the duplicate.

We are therefore of opinion, that the breaches assigned in the second count and in the replication, viz., the non-payment of the money charged to have been collected, and the failure to return the precept and duplicate, (the assessment being shown to amount at least to the sum alleged to have been collected), are sufficient; and that both the demurrers ought to have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick, for the plaintiff.

C. P. Hester, for the defendants.

COOK and Others v. BROWN and Others, in Error.

DEBT on a promissory note. Pleas, 1st, *nil debet*; 2d, payment and set-off. Two replications to the second plea.(1) Demurrers to the replications. Demurrers overruled, and final judgment for the plaintiffs. *Held*, that the judgment—the general issue remaining undisposed of—was erroneous.

(1)To a plea of payment setting forth matter of set-off, several matters of fact may be replied. Rev. Stat., 1838, p. 462.

[*221] *McPHEETERS and Others v. MCPHEETERS and Others.

CHANCERY PRACTICE—WITNESS.—The complainant in chancery has a right to an order to examine a defendant as a witness on the trial of an issue, &c., saving just exceptions; and though it is usual to suggest in the petition that the party is not interested, such suggestion is not necessary.

APPEAL from the *Washington* Circuit Court.

BLACKFORD, J. — This was a bill in chancery filed for the purpose of setting aside a will as having been obtained by fraud, &c. One of the defendants answered, and denied the allegations of fraud, &c., in the will. The Court ordered a trial at law upon the issue, whether or not the will was valid. The complainants applied to the Court for an order, that they should have leave to examine two of the defendants as witnesses, on the trial of the issue at law, subject to all just and legal exceptions; but the Court refused to make the order. The issue was tried by a jury, the examination of the said two defendants as witnesses refused on the trial, and a verdict found in favour of the validity of the will. The Court, afterwards, dismissed the bill.

The Court committed an error, in refusing to grant the order for leave to the complainants to examine two of the defendants

Holeman v. Lamme.

as witnesses, saving just exceptions. It is true, the usual practice, in applying for the order, is to suggest in the petition that the party to be examined is not interested; and it does not appear that any such suggestion was made in this case. But it has been held, that it is not essential in obtaining the order that such suggestion should be made; because the question whether the party is a competent witness or not, must be raised at the hearing of the cause; *Lee v. Atkinson*, 2 Cox, 413; and no objection to his evidence is waived, except that which arises from his being a party to the record. Without the order, the defendants could not be examined; *Wheeler v. Emmerson*, 2 Blackf., 293; and as it was an order of course, the refusal to grant it is error.

[*222] **Per Curiam*.—The decree is reversed with costs.

Cause remanded, &c.

J. Collins and *J. W. Payne*, for the appellants.

H. P. Thornton and *G. G. Dunn*, for the appellees.

HOLEMAN v. LAMME.

VENDOR AND PURCHASER—PLEADING.—Debt on a promissory note by the assignee of the payee against the maker. Plea, that the note was given in consideration of the purchase, by the defendant from the payee, of a certain tract of land; that the latter, at the time the note was given, executed to the former a bond conditioned for a conveyance of the land to him on the day the note was payable; and that no deed had, on that day or at any other time, been made or offered to be made. *Held*, that the plea was good. *Held*, also, that a general replication to such plea, that the consideration had not failed in manner and form, &c., was sufficient. (a)

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—Debt upon two promissory notes by the assignee of the payee against the maker. Plea, that the notes were given in consideration of the purchase by the defendant from the payee of a certain tract of land; that the latter, at

(a) *Mix v. Ellsworth*, 5 Ind., 517.

Park, for the Use of Dutton, v. Ballentine and Others.

the time the notes were made, executed to the former a bond conditioned for the conveyance to him, by deed in fee simple, of the land so purchased, on the day on which the notes were payable; and that no deed had, at the time designated, or at any other time, been made or offered to be made. Replication, that the consideration of the notes had not failed in manner and form, &c. General demurrer to the replication sustained; and judgment for the defendant.

The judgment must be reversed. This Court has repeatedly decided, that a general replication in the form above stated to a plea of failure of consideration is good. *Mitchell v. Sheldon*, 2 Blackf., 185; *Farmer v. Fairman*, Nov. term, 1839. We have also held that a plea, similar to the one in the record, is a valid plea of the failure of consideration. *Leonard v. Bates*, 1 Blackf., 172; *Cunningham v. Gwinn*, 4 Id., 341; *Owen v. Norris*, November term, 1840.

[*223] **Per Curiam*.—The judgment is reversed with costs.

Cause remanded, &c.

Z. Baird, for the plaintiff.

D. Mace, for the defendant.

PARK, for the Use of DUTTON v. BALLENTINE and Others.

EQUITY PRACTICE—PARTIES.—The person who is beneficially interested in the object of a bill in equity, and for whose use it is filed, should be a party to the suit.

SAME.—A bill in equity ought not to be dismissed for the want of proper parties, but should stand over for amendment.(a)

APPEAL from the Jefferson Circuit Court.

DEWEY, J.—*Moody Park*, suing for the sole use of *William Dutton*, instituted a suit in chancery against *Victor King*, *John King* and *David Ballentine*. The object of the bill is the enforcement of a vendor's lien upon the property sold, for a

(a) *Dart v. McQuilly*, 6 Ind., 391.

Morrison v. Kelly, in Error.

part of the purchase-money. The amount unpaid is \$2,000 and interest, which is secured by a note executed by *Ballentine* to the complainant. The beneficial interest in this note is alleged by the bill to be in *Dutton*. On the final hearing of the cause, the Circuit Court dismissed the bill without prejudice to *Dutton*.

The dismissal of the bill is against established practice. It is true, the bill could not be entertained in the name of *Par*, who is shown to be a mere trustee for *Dutton*. The latter should have been a party. *Malin v. Malin*, 2 Johns. C. R., 338, and the authorities there cited. Between the present parties, the cause is not in a situation to be heard upon its merits; but the bill should not have been dismissed. The cause should have stood over, that the proper parties might have been made.

Anon., 2 Atk., 15; *Jones v. Jones*, 3 Atk., 111.

[*224] **Per Curiam*.—The decree is reversed. Cause remanded, &c.

S. C. Stevens, for the appellant.

J. G. Marshall, for the appellees.

MORRISON v. KELLY, in Error.

ASSUMPSIT against an administrator on the promise of the intestate. Plea, not guilty. *Held*, on general demurrer, that the plea was insufficient.(1)

(1) Vide *Eagle et al. v. Oliver*, Vol. 5 of these Rep., 3, and note.

END OF MAY TERM, 1842.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA

AT INDIANAPOLIS, NOVEMBER TERM, 1842, IN THE TWENTY-
SEVENTH YEAR OF THE STATE.

TYSON v. THE STATE BANK OF INDIANA.

BANK LIABLE FOR NOT PRESENTING BILL.—The State Bank of Indiana, through one of its branches, received a bill of exchange from an indorsee, before it was due, to be collected for him for a reasonable reward, but afterwards failed to present the bill to the drawee either for acceptance or payment. *Held*, that the bank was liable to the indorsee for the damages he had sustained in consequence of the failure to present the bill.(a)

ERROR to the *Tippecanoe* Circuit Court.

SULLIVAN, J.—The plaintiff brought an action of assumpsit against the defendant to recover the amount of a bill of exchange drawn on one *Bainbride*, which had been left by the plaintiff with the defendant for collection. The facts were that *Dorsey* and *Tyson* on, &c., at *Wheeling*, drew a bill of exchange on *Bainbridge* at seventy days, payable to the order of *Knox, Lloyd, and Co.*; that the payees afterwards indorsed the bill to the plaintiff; and the plaintiff, before it became due, delivered the bill to the defendant at its branch at *Lafayette*, where

(a) *The Am. Exp. Co. v. Hane*, 21 Ind., 4.

Tyson v. The State Bank of Indiana.

[*226] it was agreed between the parties, that, for a *reasonable reward to be paid to the bank, the latter would collect the bill. The bank failed to present the bill to *Bainbridge* either for acceptance or payment, by means whereof the plaintiff alleges he has wholly lost the amount of said bill. There was a general demurrer to the declaration and joinder, on which the Court gave judgment for the defendant.

The State Bank, through one of its branches, having undertaken, for a reasonable reward, to collect the plaintiff's debt, placed itself in the situation of an agent or attorney, who, for reward, undertakes to perform services for another in the line of his business or profession. He is bound to a faithful discharge of his duty, and is responsible to his employer for all damages arising from his neglect.

The contract by which the plaintiff in this case left the bill with the bank to be collected, and the promise of the defendant to collect it in consideration of a reasonable reward to be paid by the plaintiff, was in conformity with the custom of the country and the usages of banks. It is insisted, however, that the bank had not the power by its charter to make such a contract. There is nothing in the charter to sustain that objection; nor do we appreciate its force, in the mouth of the bank, as an excuse for its negligence.

Repeated adjudications have recognized the principle that governs this case. The first we shall refer to is the case of *Smedes et al. v. The Pres. and Direct. of the Bank of Utica*, 20 Johns. R., 372, 3 Cowen, 662. In that case, the plaintiffs deposited in the Bank of Utica for collection a promissory note made by *Underhill* and *Seymour*, payable to *Spencer* and indorsed to the plaintiffs. The note was not paid at maturity, and the bank neglected to give notice to the indorser, by means whereof the latter was discharged. The defendants were held responsible to the plaintiffs for the damages sustained by their neglect. The Court remarked, that the custom of receiving notes for collection was not founded on mere courtesy, but with a view to the interests of the institution, and was the source from whence profit may and did arise. The reasonable expect-

tation that profit would result, was a sufficient consideration for the undertaking.

The case of *The Bank of Utica v. McKinster*, 11 Wend., 473, is to the same effect. That was an action on the [*227] case *by *McKinster* against the bank for breach of duty in neglecting to demand payment of a promissory note, alleged in the declaration to have been left by the plaintiff with the bank to be collected for the benefit of the plaintiff, and in neglecting to give notice of non-payment to the indorsers of the note, whereby *McKinster* lost his debt. The Court were unanimously of the opinion that the defendants were liable.

In *Allen v. Suydam*, 20 Wend., 321, it is decided that an agent who receives for collection, before maturity, a bill payable on a particular day after date, is held to strict vigilance in making presentment for acceptance, and, if chargeable with negligence, is subject to the payment of all damages sustained by the owner.

In *Fabens v. The Mercantile Bank*, 23 Pick., 330, it is said to be a general rule, that if a bank receive a note for collection, it is bound to make a seasonable demand on the promiser, and in case of dishonour to give due notice thereof to the indorser.

The last case we shall notice is that of *The Pres. and Direct. of the Bank of Washington v. Triplett et al.*, 1 Pet. R., 25. The facts of that case were that one *Briscoe*, a citizen of *Alexandria*, drew a bill of exchange on *Carnes*, a citizen of *Washington*, payable four months after date to the order of *Triplett* and *Neale*. The bill was payable at no particular place. The payees of the bill indorsed it in blank to the cashier of a bank in *Alexandria*, to be transmitted through that bank to a bank in *Washington* for collection. The bill was sent to the Bank of *Washington*, and not being paid at maturity, suit was brought by *Triplett* and *Neale* against the Bank of *Washington* to recover the amount of the bill. The declaration alleged that the bank did not use reasonable diligence to collect the money, nor take the necessary measures to charge the drawer, but neglected to present the bill either for acceptance or payment, and

 White and Another v. Guest.

to have the same protested, &c. In the Circuit Court, judgment was given against the bank for the whole amount claimed by the plaintiffs. There were various points raised in the case, and the judgment of the Circuit Court was reversed; but it was said that the liability of the bank for the bill placed in its hands for collection, depended on the question whether [*228] reasonable and due *diligence had been used in the performance of its duty, and it was admitted by the Court that by failing to demand payment in time, the bank would make the bill its own and become liable to *Triplett* and *Neale* for its amount.

The cases cited decide the one under consideration. The State Bank, through its branch at *Lafayette*, agreed with the plaintiff, for a valuable consideration, to collect the bill described in the declaration. The plaintiff confided his interests to the prudence and fidelity of the bank. The defendant made no effort, as we learn from the declaration, to collect the bill. It was not presented to the drawee for acceptance or payment, consequently there was neither protest nor notice of its dishonour. For such negligence, the defendant is responsible to the plaintiff for the damages he has sustained.

The Court erred in sustaining the demurrer to the declaration.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Lockwood, for the plaintiff.

Z. Baird, for the defendant.

WHITE and Another v. GUEST.

PLEADING.—*Semble*, that a plea in bar of the action generally, which contains only matter of defense that occurred after the commencement of the suit, is bad on general demurrer.

SAME.—A declaration on a written instrument must set out the instrument either *in hæc verba*, or according to its legal effect.

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SPECIAL BAIL.—A declaration professing to give the legal effect of a general recognizance of special bail taken on the back of the writ, must give it the meaning prescribed by statute, which is the same as that of a regular recognizance of special bail.

SAME—EXONERETUR—The bail has a right to an *exoneretur* without a render of the principal, in cases where the latter, if rendered, would be entitled to an immediate discharge. And the statute abolishing imprisonment for debt gives the bail a right to such *exoneretur*.

SAME.—An *exoneretur* entered on the motion of the bail after an action commenced against him, is a good ground for dismissing the suit at the costs of the bail; but it should not be pleaded in bar of the action

[*229] *ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—*White* and *Lockwood* sued *Guest*, at the *February* term, 1842, of the *Tippecanoe* Circuit Court, in debt. The declaration was filed on the fourth day of the preceding *January*. It alleges that the plaintiffs had sued out a writ of *capias ad respondendum* against one *Hunt* (reciting it), with an order of bail thereon; that the sheriff, to whom the writ had been delivered, arrested *Hunt*; that the defendant “executed upon the back of said writ a recognizance of special bail, whereby he acknowledged himself special bail for the said therein named *Hunt*, in the suit named in the said writ;” and that the plaintiffs recovered a judgment against *Hunt*, &c. Then follows an averment that *Hunt* had not paid the judgment, nor rendered himself in execution, &c. The defendant appeared, and, before the calling of the cause, moved the Court “to enter an *exoneretur* on the bail-bond or piece declared on, on account of the act entitled ‘An act to abolish imprisonment for debt, passed *February* the 12th, 1842.’” The Court sustained the motion, and ordered an *exoneretur* to be entered. The defendant then filed several pleas, and amongst them the following: “And for a further plea in this behalf, the said defendant says *actio non*, because he says that heretofore, to wit, at the *February* term of this Court in the year 1842, on the second day of said term, it was ordered by the judgment of said Court that an *exoneretur* be entered on the writing obligatory, or recognizance of bail, in said declaration mentioned; and that, by the judgment of said Court, the said

defendant was discharged from all liability on the same." To this plea, the plaintiffs, without noticing the other pleas, demurred generally. The demurrer was overruled, and final judgment rendered for the defendant.

One, and the only question necessarily presented for the decision of this cause, is, was the judgment of the Circuit Court upon the demurrer, in view of the plea and declaration, right or wrong?

Applications in behalf of bail for an *exoneretur* are not usual when the bail has a good defense by way of plea. They are generally resorted to only in those cases in which no defense, *stricti juris*, exists, but when, nevertheless, under the rules and practice of courts founded on equitable considerations, [*230] *relief will be granted on motion; as, for instance, when the principal has been rendered between a return of *non est* to a *ca. sa.*, and the time fixed by the indulgence of the Court for the render; 1 Tidd's Pr., (Am. ed.), 238, 9; 2 Johns. Cases, 283; *Wilmore v. Clerk et al.*, 1 Ld. Raym., 156; *Fisher v. Branscombe*, 7 T. R., 351; or when, owing to the right of the principal to be immediately discharged from custody, were he surrendered, the render is dispensed with, and to avoid circuitry of proceeding, relief is granted without it; as in cases of persons discharged under bankrupt and insolvent laws, and persons otherwise privileged from arrest. *Martin v. O'Harra*, Cowp., 823; *Mannin v. Partridge*, 14 East, 599; — *v. Bruce*, 2 Chitt. R., 105; *Trinder v. Shirley*, Dougl., 45; *Phillips v. Wellesley*, 1 Dowl. P. C., 9; *Todd v. Maxfield*, 3 B. & C., 222; *Beers et al. v. Houghton*, 1 McLean's R., 226.

But if it be granted that there may be instances, in which it would be proper to *plead* an *exoneretur* in bar of an action against bail, the plea in the record is probably defective in this, that it professes to reach and deny the right of the plaintiff to *commence* the suit, whereas it alleges matter having its origin after the institution of the action. A plea containing only such matter should not question the right of the plaintiff to have his action originally; it should only deny his right further to prosecute it; and this defect seems to be reached by a general

demurrer. *Le Bret v. Papillon*, 4 East, 502. It is not, however, necessary to decide directly upon the merits of this plea, for we conceive the declaration to be substantially bad. It alleges that the defendant entered into a recognizance upon the back of the writ, whereby he acknowledged himself special bail for *Hunt* in the suit therein named; but it does not state the terms and conditions of the recognizance. It is true, we have a statute requiring special bail to be given in that general form, and declaring that it "shall have all the force and effect of a regular recognizance of special bail, and be in all respects obligatory as such." R. S., 1838, p. 446. This is virtually saying, that the entry of bail on the back of the writ, in the general form prescribed, shall mean that the principal shall pay the condemnation money in the original suit, or render his body in execution, for such is the force and effect of a regular recognizance of bail. But the statute, [*231] *though it affixes the meaning to the form which it prescribes, does not interfere with the ordinary rules of pleading. One of those rules is, that in declaring on a written instrument, the pleaders shall either set out its legal effect, or give it *in hæc verba* to enable the Court to put upon it the proper construction. The declaration which we are considering does neither, and is, therefore, defective. It should either have professedly set out the very words of the recognizance, or stated it according to the meaning prescribed by the statute. This point was settled in the case of *Hysinger v. Colman*, 5 Blackf., 596. The judgment of the Circuit Court was right in consequence of the insufficiency of the declaration.

There is a feature presented by the record, which, as it may have a bearing upon the ultimate rights of the parties in another suit on the recognizance of bail, we will proceed to consider now. We allude to the *exoneretur* which was entered on the motion of the defendant. The question is, was it correctly entered? It is the law of this State, that in all cases against special bail, if the principal shall surrender himself or be surrendered by his bail before final judgment, an *exoneretur* shall be entered on the record, and the suit dismissed at the

. Voorhees and Co. v. Hoagland.

cost of the bail. R. S., 1838, p. 454. By another law, enacted by the last Legislature, no person is to be imprisoned on civil process without a previous affidavit imputing to him fraud; and all persons confined in prison, or having the privilege of the prison bounds, at the time the act took effect, were discharged. Laws of 1842, pp. 68 to 70. Under this act, the *exoneretur* in question was entered. We have already seen that it is a well settled rule of law, that in all cases in which bail would be entitled to relief on motion in consequence of the actual render of the principal, they will, to avoid circuitry of proceeding, be relieved by the entry of an *exoneretur* without the render, provided the principal, if surrendered, would be entitled to an immediate discharge from custody. The case before us is embraced by this rule. Had the principal been rendered, he could not, under the statute abolishing imprisonment for debt, have been retained in custody; the plaintiff could not have charged him in execution without an affidavit charging him with the fraudulent concealment of his [*232] property. We think the *exoneretur* was *correctly entered. Had the declaration been sufficient, the proper course for the bail to pursue was to move the Court to dismiss the suit at his own cost. The statute does not contemplate that he should procure an *exoneretur*, and then plead it in bar of the pending action so as to throw the cost on the plaintiff. We do not mean to say, however, that an *exoneretur* may not be pleaded in bar to a subsequent action against the bail.

Per Curiam.—The judgment is affirmed with costs.

R. A. Lockwood, for the plaintiff.

G. S. Orth, for the defendant.

VOORHEES and Co. v. HOAGLAND.

FOREIGN ATTACHMENT—PRACTICE.—On an appeal to the Circuit Court from a justice's judgment in a case of foreign attachment, the parties appeared

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and, by their agreement, the cause was tried by the Court. Judgment for the plaintiff. The judgment was objected to on error, because the attachment-bond was defective, and because publication of the pendency of the suit had not been made and proved before the justice continued the cause. *Held*, that the objections came too late.

SAME.—The above-mentioned suit was against several partners, and it was proved on the trial in the Circuit Court that one of them resided in this State when the suit was commenced. *Held*, that the suit might have been objected to on account of such residence by a plea in abatement, but that it was too late to make the objection after the defendants had appeared to the action, and entered on a trial of the merits.

SAME.—A writ of foreign attachment may issue, by statute, against partners in the name of their firm.

ERROR to the *Franklin* Circuit Court.

BLACKFORD, J.—This was a writ of foreign attachment, issued by a justice of the peace in favour of *Hoagland* against *J. and P. Voorhees and Co.* Judgment before the justice for the plaintiff by default. The defendants appealed. The parties appeared in the Circuit Court, and by their agreement, the cause was submitted to the Court without a jury. The suit was tried on the merits, and judgment rendered for the plaintiff.

The defendants' first objection to the judgment is, that the attachment-bond filed before the justice is insufficient. [*233] this *objection comes too late. It should have been made before the defendants appeared to the action, and entered into a trial of the merits.

The next objection is, that the publication of the pendency of the suit was not made and proved before the justice continued the cause, &c. This objection, like the other, comes too late.

It is also objected, that the judgment is for more than the amount claimed by the plaintiff before the justice; but the facts do not warrant this objection. The judgment is for the amount claimed in the affidavit filed before the justice, with interest; *Henrie v. Sweasey*, 5 Blackf., 273; and it is agreed by the parties that the affidavit was unobjectionable, and that the plaintiff filed before the justice a bill of particulars amounting to the sum named in the affidavit.

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Another objection is, that it was proved on the trial in the Circuit Court that one of the defendants was resident in the State when this suit was commenced. That objection would have been good, had the defendants taken advantage of it in time by a plea in abatement in the Circuit Court. But it was too late to make it after they had appeared to the action, and entered on a trial of the merits.

The suit is commenced against the defendants in the name of their firm of *J. and P. Voorhees and Co.*; but that mode of proceeding is authorized by statute in such cases. Rev. Stat., 1838, p. 80.

Per Curiam.—The judgment is affirmed, with six *per cent.* damages and costs.

G. Holland, for the plaintiffs.

J. Ryman, for the defendant.

MCCAMENT, Administrator, v. GRAY.

PARTNERSHIP—CHANCERY PLEADING.—*A* and *B*, on their discontinuance of business as partners, agreed that *B* should collect the debts of the firm, and that the amount when collected should be equally divided between them. *Held*, that a bill in chancery afterwards filed by *A* against *B* for the complainant's share of the money collected, was bad on demurrer, for omitting to state the time when the collection was made.

[*234] *SUIT in chancery certified from the *Scott* Circuit Court.

BLACKFORD, J.—The complainant, as administrator of *Fleming*, filed a bill in chancery against the defendant in October, 1832.

The bill charges that *Fleming*, the complainant's intestate, and the defendant, entered into partnership in 1816, and continued in partnership for about two years; that when they discontinued business, the defendant agreed to collect the debts due the firm, and the parties agreed that the amount when collected should be equally divided between them; that the

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defendant had collected several judgments and a note or account due the firm, all which are described, but had refused to pay any part of the same to the complainant, &c.

This bill was demurred to, and the demurrer sustained, on the ground that the time when the judgments and the note or account mentioned in the bill were collected, was not stated.

The bill has been since amended by stating that *Fleming* died in 1819; and that the said note or account was collected by the defendant in *Fleming's* lifetime; and by stating also, that the complainant is not informed at what time the said judgments were collected. There is a demurrer to the amended bill.

It is necessary that the bill should state the time when the collections were made, although the complainant would not be bound to prove the money to have been collected on the particular day alleged. The reason why a time should be stated when the collections were made is, that it may appear on the face of the bill whether or not the suit is barred by the statute of limitations. *Jenkins v. Prewitt*, 5 Blackf., 7. The amended bill shows that the claim arising from the collection of the note or account, is barred by the statute; and it omits, as the original bill did, to state when the judgments were collected. The demurrer to the amended bill is therefore sustained.

DEWEY, J., having been concerned as counsel, was absent.

[*235] *JENNERS, Administrator, v. OLDHAM.

ATTORNEY AND CLIENT—WITNESS. — An attorney brought suit on a note delivered to him for collection, and obtained judgment, which did not appear by the record to have been satisfied. The judgment-creditor sued the administrator of the attorney for the amount of the judgment, in an action for money had and received. *Held*, that the plaintiff could not introduce the judgment-debtor as a witness, to prove that the latter had paid to the attorney the money due by the judgment.

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Seemle, that a stranger to a record can give it in evidence against the successful party, in a subsequent suit against such stranger for the same cause of action.

ERROR to the *Tipppecanoe* Circuit Court.

DEWEY, J. — *Oldham* sued *Jenners*, as the administrator of *Brown*, for money had and received by the intestate in his lifetime. Pleas, the general issue, and several special pleas which led to issues of fact. Judgment for the plaintiff. On the trial, it appeared that the plaintiff had placed in the hands of the intestate, as an attorney at law, a promissory note against one *Taylor* for collection; and that the intestate had obtained a judgment against *Taylor*, which did not appear by the record to have been satisfied. The plaintiff, claiming that the money due by the judgment had been paid by *Taylor* to the intestate, offered *Taylor* as a witness to prove that fact. The defendant objected to his admissibility, but the Court overruled the objection, and he was sworn.

The question presented for our consideration is, was the witness incompetent on the score of interest?

It is a general well known principle of law, that a person having a direct legal interest in the event of a suit, or being interested in the record, is incompetent as a witness. This latter kind of interest exists when the verdict will be evidence in a subsequent action by or against the witness. It is another general rule, that a verdict is not evidence for or against a person not a party to it, and who does not claim under one of the parties. There are, however, exceptions to this rule, and one of them seems to be, when the former verdict is offered in evidence by a stranger against the successful party. Mr. *Phillips*, after stating the general reason why a verdict is not evidence in favour of a person not a party to it, says, [*236] "But this reason, it is evident, only applies*when the verdict is offered in evidence by a third person, against the party who failed in the former action, and not when it is produced against the party who succeeded. 1 *Phill. Ev., Am. ed.*, 327. In the case of *Hudson v. Robinson*, 4 M. & S., 475, in which the question was, whether the defendant individually,

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or the firm to which he belonged, was liable for the plaintiff's demand, two of the judges, *Le Blanc* and *Bayley*, remarked, that a recovery against the defendant would bar a subsequent action against the firm for the same transaction. The same principle is recognized in *Morris v. Robinson*, 3 B. & C., 196, where it was admitted by the Court, that a recovery in trover against one person for the full value of the property sued for, would bar an after action against another person for the same cause. So, in *McBrain v. Fortune*, 3 Campb., 317, it was held, that a person who had purchased goods in his own name of the plaintiff, was not a competent witness for the latter, to prove that he acted in the transaction merely as the agent of the defendant. Lord *Ellenborough* rested this decision on the ground, that if the plaintiff succeeded, the verdict would be evidence to discharge the witness from his *prima facie* liability on the contract which he had made in his own name. We refer to this case only for the purpose of showing, that a third person may make use of the record, to which he was not a privy, to screen himself from responsibility to a successful party. We are aware that as to the question of interest in the witness, it seems to conflict with other decisions, in which an agent had been held to stand indifferent between the parties, on the ground of his responsibility to his principal, rendered liable by his testimony. *Ilderton v. Atkinson*, 7 T. R., 476; *Evans v. Williams*, Id., 477, n.; *Rocher v. Busher*, 1 Stark. C., 27.

In the cause before us, a debtor in a judgment unsatisfied of record, is offered to prove the payment by himself of the money due by the judgment to the plaintiff's attorney. It is clear, from the authorities which we have cited, that, should this plaintiff succeed, the witness could avail himself of the recovery, in any subsequent proceeding on the judgment to enforce payment of the same debt by him. The plaintiff would not be permitted to claim that the money had been

[*237] *paid to the attorney, recover a judgment for it against his administrator, and still hold the witness liable. The only argument in favour of the competency of this witness is the supposition, that, should this action fail, and the

judgment should be enforced against him, either by an action of debt, or by an execution, he could turn round and sue this defendant, as the administrator of the attorney, and, in that suit, could give in evidence the record of the proceedings against himself. Admitting all this to be true, it does not establish the indifference of the witness between these parties. The record would be evidence only of the simple fact of the recovery. It would not fix the liability of the administrator; to do that, one thing more would be necessary, proof that the witness had paid the money to the attorney; whereas if this suit prevails, its record would not only be evidence of the fact of the recovery, but it would absolutely discharge the witness from his liability on the original judgment. We think, therefore, that *Taylor* had such an interest in the record of this suit as to render him incompetent as a witness.

The case of *Hayes v. Grier*, 4 Binn., 80, is in point. It was there decided that a person, against whom a county tax had been assessed, could not be a witness to prove that he had paid the tax to the defendant to be handed over to the plaintiff, who was the treasurer of the county to which the tax was due. The decision turned on the principle, that the record of recovery against the defendant could be given in evidence, in an action against the witness for the tax, and would be a bar.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Jenners and *R. A. Chandler*, for the plaintiff.

R. A. Lockwood, for the defendant.

JENKINS v. PREWITT and Others.

BILL OF REVIEW—TIME.—A bill of review founded on newly discovered evidence was filed *October* the 2d, 1832; and the discovery of the new matter was averred to have been made in the summer of 1828. *Held*, that the bill appeared to be filed in time.

[*238] *BLACKFORD, J.—This is a bill of review certified
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from the *Clark* Circuit Court. A demurrer to the bill has been heretofore sustained by this Court, on the ground that the time when the new matter relied on was discovered, was not stated in the bill. 5 Blackf., 7. Since that decision was made, the bill has been amended by stating that the new matter was discovered during the summer of the year 1828, the month not recollected, and not before that time; and a second demurrer to the bill has been filed.

The only question to be inquired into on the present demurrer is, whether the bill now shows that it was filed within five years from the time the new matter was discovered?

As the bill was filed *October* the 2d, 1832, and the discovery of the new matter is averred to have been made in the summer of 1828, it appears that the bill was filed in time; and the demurrer is therefore overruled.

DEWEY, J., having been concerned as counsel, was absent.

MILLER and Others v. TIPTON and Others.

FORECLOSURE—PARTIES—DECREE.—The holder of a certificate for canal land, on which part of the purchase-money had been paid, executed a mortgage on the land. *Held*, on a bill of foreclosure, &c., that the canal commissioners need not be parties to the suit; that the interest of the holder of the certificate might be mortgaged; and that it was not necessary that a decree in the case for the complainant, should direct the certificate to be delivered to the purchaser under the decree. (a)

ERROR to the Cass Circuit Court.

SULLIVAN, J.—The defendants in error, as the administrators of *John Tipton*, deceased, filed a bill to foreclose a mortgage executed by the plaintiffs in error to *Tipton* in his lifetime. The property mortgaged consisted of three tracts of land held by certificates issued by the canal commissioners, and on which a part of the purchase-money only had been paid. The bill prayed a foreclosure, and that the right and title of the plain-

(a) *Dickerson v. Nelson*, 4 Ind., 160; 1 Id., 81.

tiffs in error in and to the land might be sold, &c.
[*239] There was a demurrer to the bill which was *over-ruled by the Court, and the defendants refusing to answer, there was a decree for the complainants.

The first reason assigned for the reversal of the decree is that the bill is defective for the want of proper parties. It is contended that the canal commissioners, who, by law, are authorized to convey to purchasers the legal title to the land, should have been made parties to the bill. The objection is not well taken. All persons having an interest in the object of the suit, and whose rights are to be affected by the relief prayed, should be made parties. But we do not perceive that the rights of the commissioners can be affected by granting to the complainants all they pray for. The bill does not seek to disturb the legal title to the land. Its object is only to reach the interest of the mortgagors. The sale of that interest may be decreed without interfering with the legal title. It will remain where it now is until the purchaser under the decree shall entitle himself, by the payment of the residue of the purchase-money, to a conveyance in fee.

It is further urged that the title of the plaintiffs in error to the land, being but an equitable one, was not a mortgageable interest; but this is not so. Any interest in land which may be sold or conveyed, may be mortgaged. 2 Story's Equity, 290; 4 Kent's Comm., p. 144.

It is also objected against the decree that it does not direct the certificates to be delivered to the purchaser at the sale that may be made under the decree. This objection would be more forcible if made by the complainants, whose interests may, in some measure, be affected by the absence of the certificates. It is not, however, of sufficient weight to reverse the decree, inasmuch as a Court of Equity is competent to protect the interests of a *bona fide* purchaser.

Per Curiam.—The decree is affirmed, with two *per cent.* damages and costs.

W. Wright, for the plaintiffs.

C. Fletcher, O. Butler, and S. Yandes, for the defendants.

[*240] JENNERS v. HOWARD, Administratrix.

FRAUD—MENTAL INCAPACITY.—Debt against the administratrix of *A* on a bond alleged to have been executed by *A*, *B* and *C*, jointly and severally. Plea, *non est factum*. The defendant offered to prove "that *C* had great influence over *A*; that he had directed his distiller to let *A* have as much whisky as he wanted; and that he, *C*, could lead *A* like a child." *Held*, that the evidence was inadmissible.^(a)

SAME.—Mental incapacity at the time of contracting, produced by drunkenness or any other cause, is a good defense against the contract, whether it be by deed or parol.

SAME.—To avoid a bond on the ground that it was fraudulently obtained, it should appear that the obligee had an agency in the alleged fraud.

ERROR to the *Tippecanoe* Circuit Court.

SULLIVAN, J.—This was an action of debt on a joint and several bond against the defendant as administratrix of *Samuel Howard*, deceased, one of the obligors. The defendant pleaded *non est factum*. Verdict and judgment for the defendant.

The defense relied on was the insanity of the deceased obligor, *Howard*, at the time he signed the bond, occasioned by drunkenness.

It appeared upon the trial that the bond sued on was signed by *John Carroll*, *Joseph Riner* and *Samuel Howard*, the defendant's intestate. The defendant offered to prove the following facts, viz.: "that *Carroll* had great influence over *Howard*; that he had directed his distiller to let *Howard* have as much whisky as he wanted; and that he, *Carroll*, could lead *Howard* like a child." To the introduction of this testimony, the plaintiff objected, but the Court admitted the testimony, and the plaintiff excepted.

Mental incapacity at the time of contracting, produced by drunkenness or any other cause, is a good defense against a contract, whether that contract be evidenced by deed or parol. If the mind be incapable of assenting, the law pronounces the contract void. Drunkenness of itself merely, unless fraud be

^(a) *Gates v. Meredith*, 7 Ind., 440; 10 Id., 169.

Jenners v. Howard, Administratrix.

practiced, will not avoid a contract; but if the party be in such a state of intoxication that he is for the time deprived of reason, the contract is void. In *Harbison v. Lemon et al.*, 3, Blackf., 51, the defendants sought to avoid a mortgage because it was entered into by the mortgagor [*241] *while in a state of intoxication. The Court held, that the defendants, to succeed, must prove the drunkenness of the mortgagor to have been so great, as to produce an absolute privation of understanding for the time, similar to cases of idiocy or insanity.

In the case before the Court, we have to consider whether the testimony which was received by the Circuit Court, and objected to by the plaintiff, had a tendency to prove that *Howard* was in such a state of mind at the time he signed the bond, as to deprive him of the power of contracting?

We think it had not. Its tendency was rather to show that *Howard* was induced to sign the bond by the contrivance of *Carroll*, a joint obligor. It was not pretended that the plaintiff had any influence whatever over *Howard*, nor that there was any collusion between the plaintiff and *Carroll* to circumvent him. Nor does it appear that *Carroll* even, in reference to this transaction, exercised the influence he was said to possess. To avoid the bond on the ground of contrivance and management, by which *Howard* was led on to sign it, it should be shown that the plaintiff had an agency in the fraud practiced.

We think the testimony objected to was irrelevant and should have been rejected.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Jenners and *R. A. Chandler*, for the plaintiff.

R. A. Lockwood, for the defendant.

 Scott v. Brokaw.

SCOTT v. BROKAW.

PLEADING.—Matter of law can not be pleaded in bar of an action.

SAME.—A plea *puis darrein continuance* is a waiver of all previous pleas.

SPECIAL BAIL.—REPEAL OF STATUTE.—A suit on a recognizance of special bail was pending when the act abolishing imprisonment for debt took effect. *Held*, that it was not the immediate effect of the act to defeat the further maintenance of the suit; but that, without a render of the principal, the bail might have an *exoneretur* entered, and have the suit dismissed at his own costs.

[*242] *APPEAL from the *Knox* Circuit Court.

DEWEY, J.—Debt on a recognizance of bail. The defendant, having filed several pleas, to some of which demurrers were correctly sustained, and to others there being replications forming issues of fact, at a subsequent term pleaded as follows: That the plaintiff ought not further to have or maintain his action, “because he says, that since the last continuance of this cause, to wit, on the 12th day of *January*, 1842, the General Assembly of the State of *Indiana* did enact a certain act entitled ‘An act to abolish imprisonment for debt,’ which was approved by the Governor of the State, and is now in full force, which he is ready to verify,” &c. To this plea there was a general demurrer, which the Court overruled, and rendered final judgment for the defendant.

The plea is bad. It contains mere matter of law, which is not issuable, and which the Court is supposed to know without pleading.

If, however, the operation of the statute mentioned in the plea had been to defeat the further maintenance of the action, the defendant would have been entitled to its benefit under the demurrer. But we do not think that such should have been its immediate effect. A recognizance of special bail is forfeited by the return of a *ca. sa.* against the principal *non est*; and a right of action accrues against the bail, who can not plead in bar the subsequent death, or render, of the principal. But such a return does not always make the liability of the bail absolute. By the rules and practice of the *English* courts, cer-

tain days of grace are allowed, within which the principal may be rendered, and the bail discharged. But this species of relief is gained by motion and not by plea. So, the bail is entitled to be discharged on motion without a render of the principal, whenever, were he surrendered, he would have a right to be immediately liberated. To take him into custody under such circumstances would be obviously useless. Our statute, which is a substitute for the indulgence of the *English* practice, gives the bail the right to surrender his principal at any time before final judgment on the recognizance, to procure an *exoneretur* of record, and to have the cause dismissed at his own cost.

The operation of the statute, abolishing imprisonment [*243] for debt, excuses the bail *from the actual render of the principal, and entitles him to the same relief as if the render had been made, and to no more. See *White et al. v. Guest*, decided at this term, and the authorities there cited.

The plea *puis darrein continuance* was a waiver of all the other pleas; Tidd's Pr., 776; Bull. N. P., 309; 1 Chitt. Pl., 559; *Wallace v. McConnell*, 13 Pet., 152; and as that plea was itself bad, the plaintiff would have been entitled to judgment, but that the record shows that the defendant had procured an *exoneretur* to be entered pending the cause. The effect of that should have been a dismissal of the action at the costs of the defendant.

Per Curiam.—The judgment is reversed with costs. Cause, remanded, &c.

J. Whitcomb and *J. Law*, for the appellant.

S. Judah, for the appellee.

LEWIS v. MASTERS.

REPLEVIN—APPEAL.—The defendant in an action of replevin, commenced before a justice of the peace and taken by appeal to the Circuit Court, may, by statute, prove property in himself or a stranger without pleading it.^(a)

(a) *Hall v. Henline*, 9 Ind., 256.

Prather and Others v. Lentz, Assignee.

APPEAL from the *Huntington* Circuit Court.

DEWEY, J.—Replevin before a justice of the peace appealed to the Circuit Court. The defendant filed no plea or defense in either Court. Verdict and judgment for the plaintiff. On the trial, the defendant offered to prove property in a stranger, and property in himself. The evidence being objected to was excluded by the Court.

By a statute, passed in 1835, it is enacted, “that in all actions of replevin before justices of the peace, evidence may be given by the defendant of property in himself, or a stranger, without specially pleading the same.” Laws of 1835, p. 51. This law, it is true, is not reprinted among the revised statutes of 1838, but we know of no act repealing it. Being in force, it rendered the rejected evidence legal. The Circuit Court committed an error in excluding the testimony.

[*244] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the appellant.

T. Johnson, for the appellee.

PRATHER and Others v. LENTZ, Assignee

WITNESS.—In an action on a promissory note brought by the assignee of the payee against the maker, the latter may call the payee as a witness to prove a plea of usury, or of payment to the witness before notice of the assignment, but not to prove a plea of payment to the plaintiff.

SAME.—If a witness be competent to answer any questions in the cause, he ought not to be rejected generally.

APPEAL from the *Clark* Circuit Court.

BLACKFORD, J.—*Lentz*, as assignee of the payee of a promissory note, brought an action of debt on the note against the makers, *Prather* and others. Pleas: 1st, That the note was executed by the defendants upon a usurious consideration; 2d, Payment to the payee before notice of the assignment; 3d, Pay-

ment to the plaintiff. Replications in denial of the pleas. The cause was submitted to the Court, and judgment rendered for the plaintiff.

The defendants, on the trial, offered as a witness the payee of the note, to prove the usurious consideration and the payments set out in the pleas. The plaintiff objected to the witness as incompetent, and the Court sustained the objection. The refusal to admit the witness is assigned for error.

One objection made to the admission of the witness to prove the first plea is, that as he indorsed the note, he can not be permitted to invalidate it. This objection is sustained by the cases of *Walton v. Shelley*, 1 T. R., 296; *Bank of the U. S. v. Dunn*, 6 Peters, 51; *Bank of the Metropolis v. Jones*, 8 Peters, 12. The decisions of some of the State Courts are in favour of the objection, and of others against it. The Supreme Court of the *United States*, in the two last cited cases, relies on the authority of *Walton v. Shelley*, but does not notice in either of them the case of *Jordaine v. Lashbrooke*, 7 T. R., 597, which, [*245] after a very full and *able examination of the subject, expressly overrules the case of *Walton v. Shelley*.

We are satisfied, on reading the case of *Jordaine v. Lashbrooke*, that this objection to the witness is untenable. The language of *Lawrence, J.*, in the last-named case is as follows: "The constant practice of examining accomplices, &c., shows that the mere circumstance of a man's representing himself as having done things inconsistent with common honesty, is not sufficient to reject his testimony, however it may weaken and impeach it. Nor is there any distinction with respect to negotiable securities, when the point to be considered is the competency of the witness; for supposing what he has done in putting such instruments into circulation, to be ever so great a fraud and ever so mischievous, he still is a witness unconvicted of any crime, and without interest, and not more devoid of principle than many who have been mentioned as being constantly admitted." This case of *Jordaine v. Lashbrooke*, is still adhered to by the *English* Courts. Chitt. on Bills, 654; 1 Phill. Ev., 43. In forming our opinion against the first

objection to the witness, we have not deemed it necessary to examine whether the first plea was valid or otherwise.

The other objection to the admission of the witness to support the defense of usury, is that he is interested; and that objection is also made to his admission to support the other pleas. As respects the issue on the plea of usury (supposing that plea to be valid), and the issue on the plea of payment to the witness before notice of the assignment, we think the witness could not be benefited by the defendants' succeeding on those issues. The assignment contains a warranty that the note was valid and had not been paid. *Howell v. Wilson*, 2 Blackf., 418. Should either of the first two issues, therefore, be found for the defendants, the witness would be liable on the assignment, in consequence of the warranty contained in it; and his evidence in the present case might be proved against him in the subsequent suit on the assignment. It was, therefore, the witness' interest, that the first two issues should be found against the defendants, by whom he was called.

But with respect to the third plea, which is payment to the plaintiff, we have come to the conclusion, though not [*246] *without difficulty, that the witness has an interest in supporting that plea which renders him incompetent. By the assignment of the note, the witness contracted with the plaintiff, *inter alia*, that if the latter should obtain judgment, and take out a *fiери facias*, against the makers in due time, and the execution should be returned no property found, he, the witness, would be liable to the plaintiff for the amount, &c. This contract of warranty by the witness, without which it is to be presumed the plaintiff would not have purchased the note, will be discharged, if the defendants succeed on the last issue. We think, therefore, the witness could not, on account of his interest, be examined in support of the last plea. This opinion is sustained by the analogous case of *Wilson et al. v. Alexander*, 9 Leigh's Rep., 459.

As the witness was competent as regarded the first two pleas, he ought to have been admitted, and his testimony limited to the issues on those pleas. *Bent v. Baker*, 8 T. R.,

Wiley v. Forsee.

35, 36, where it is said by *Buller, J.*, that if a witness be competent to answer any questions, he ought not to be rejected generally.

Per Curiam.—The judgment is reversed with costs. Cause remanded &c.

J. G. Marshall, for the appellants.

R. Crawford, for the appellee.

WILEY v. FORSEE.

TRANSCRIPT—CERTIFICATE—MISTAKE.—The clerk of the Circuit Court, in entering of record a justice's transcript, &c., which was on file and certified under the hand and seal of the justice, omitted the seal to the certificate. *Held*, that the mistake might be amended.

SAME.—The said certificate, after being amended, was as follows: "I, *Samuel Dale*, a justice of the peace in and for *Noble* township, county and State aforesaid, hereby certify the above to be a true transcript from my docket. *June 1, 1841. Samuel Dale, J. P. (Seal.)*" *Held*, that the certificate was sufficient.(a)

[*247] *ERROR to the *Hamilton* Circuit Court.

BLACKFORD, J.—*Scire facias* in favour of *Forsee* to have execution against real estate on a justice's transcript. The *scire facias* states, among other things, that the plaintiff had obtained judgment against the defendant before a justice of the peace; that an execution had been issued on the judgment and returned no goods or chattels; that a certified transcript of the judgment and proceedings was on file in the clerk's office of the Circuit Court; and that a transcript of the judgment was filed in said office and entered on the docket and order book of the Court. Plea, that there was no such certified transcript of record in said Court, &c. Replication, that there was such transcript of record, &c. The cause was submitted to the Court.

The plaintiff, on the trial, moved the Court to amend the

(a) *Ward v. Hazlerigg*, 7 Blackf., 46.

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record of the justice's transcript, by annexing a seal to the justice's name at the end of his certificate, the original transcript on file being certified under the hand and seal of the justice. The motion was sustained and the amendment made. The plaintiff then offered the record of the transcript in evidence, to which the defendant objected. The evidence was admitted. The Court gave judgment for the plaintiff.

The errors assigned are, 1st, That the amendment was illegal; 2d, That the justice's certificate to the transcript as amended was insufficient.

There is no error in this case. The omission in the record of the justice's seal to his certificate, was a mere misprision of the clerk, and was amendable. The certificate as amended was as follows: "I, *Samuel Dale*, a justice of the peace in and for *Noble* township, county and State aforesaid, hereby certify the above to be a true transcript from my docket. *June 1, 1841, Samuel Dale, J. P. (SEAL.)*" There can be no objection to that certificate.

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave, for the plaintiff.

L. Barbour, for the defendant.

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*THE STATE v. FREEMAN.

CRIMINAL LAW.—PRACTICE.—An objection to an indictment because the grand jury that found it was irregularly impaneled, must be made by plea, and not by motion to quash. (a)

SAME—LIQUOR LAW.—An indictment for selling spirituous liquor contrary to the 56th section of the act relative to crime and punishment, should aver that the liquor was sold to be drunk in the house, &c., of the vendor.

SAME.—When an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved.

ERROR to the *De Kalb* Circuit Court.

SULLIVAN, J.—This was an indictment under the 56th sec-

(a) *Shattuck v. The State*, 11 Ind., 473.

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tion of the act relative to crime and punishment, by which it is made unlawful for any person to vend without being licensed to do so, spirituous liquors to be drunk in his house, out-house, yard, or garden. On motion of the defendant, the indictment was quashed by the Circuit Court.

A reason given for quashing the indictment was, that there was a defect "in drawing and impanneling the grand jury that found the bill." To have made this reason sufficient, the irregularity in impanneling the jury, should have been made to appear by plea. In this case there was no plea, nor agreement of parties by which the facts were spread upon the record. A motion to quash must be founded upon defects apparent on the record. In this case the indictment appears regular on its face, and it is not shown how the Court became informed of the defect complained of.

There is, however, a fatal defect in the indictment. The offense, by the statute, consists in vending, without license, spirituous liquors to be drunk in the house, &c., of the vendor. The charge in the indictment is, that the defendant on, &c., at, &c., did sell to one W. G. a certain spirituous liquor commonly called whisky, to wit, one quart of whisky, then and there drunk in his house, he the said defendant not being licensed to sell, &c. The indictment omits to aver that the liquor was sold *to be drunk* in the house, &c., of the defendant. This is a fatal defect. It is not made an offense by the statute to sell spirituous liquor without license, by the quart or a larger quantity, unless it be sold to be drunk at the vendor's house, &c. The intent, therefore, with which it was sold is material, and should have been alleged. In many [*249] cases, the *allegation of intent is merely formal, being no more than the inference which the law draws from the act itself, and which therefore requires no proof but what the act itself supplies; but where the act is indifferent in itself, and becomes criminal only from the intent with which it was done, the intention then becomes material, and it is as necessary to allege and prove it, as any other of the facts and circumstances of the case. *Rex v. Philipps*, 6 East, 464.

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The averment in this indictment, that the liquor was sold by the defendant and drunk in his house, is not equivalent to an averment that he sold it *to be drunk* there. The liquor may have been drunk there without his knowledge or consent.

As the indictment does not contain an offense punishable by the statute, the Court did right in quashing it.

Per Curiam.—The judgment is affirmed.

H. O'Neal, for the State.

T. Johnson for the defendant.

TUELL v. WRINK and Others.

FALSE IMPRISONMENT.—An action of trespass does not lie against *A*, for procuring a justice's warrant to search the premises and arrest the person of *B*, on suspicion of felony, and thereby causing the search and arrest to be made, although *A* acted maliciously and without probable cause; *B*'s only remedy for the injury being an action on the case.

SEARCH WARRANT.—The warrant of a justice of the peace commanding a constable to search the premises, &c., of *B. P. Tuell*, does not command or authorize the constable to search the premises, &c., of *Benjamin P. Tuell*.

NEW TRIAL.—If in trespass against *A*, *B*, and *C*, there be a verdict for the defendants which is right as to *C*, but which, as to the others, is unsupported by the evidence, a new trial should be granted to the plaintiff, on condition that he enter a *nolle prosequi* as to *C*.

APPEAL from the *Jackson* Circuit Court. The appellant, *Benjamin P. Tuell*, was the plaintiff below.

SULLIVAN, J.—*Tuell* brought an action of trespass for an assault and battery and false imprisonment against *Wrink*, *Downing*, and *Fislar*. The defendants severed in pleading, each putting in a plea of not guilty, and a special plea of justification. The special plea of *Wrink* was as follows,
 [*250] viz.: *That on, &c., he was the owner of a certain red heifer, and that he had good and probable cause to suspect and believe, and did suspect and believe, that said heifer, within fifty days, &c., had been feloniously stolen, &c., from the premises of said *Wrink*, at, &c., and that said heifer was then concealed in and about the premises of the plaintiff at,

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&c., whereupon he appeared before the defendant *Downing*, a justice of the peace, &c., and made an affidavit in due form of law, setting forth that, within fifty days previous thereto, a certain red heifer of the value, &c., by some person unknown had been feloniously stolen, taken, and carried away from the premises of said affiant, and that he verily believed said heifer was concealed in and about the premises of *B. P. Tuell*, at, &c., whereupon the said *Downing*, justice as aforesaid, issued a warrant directed to the defendant *Fislar*, then being a constable, &c., commanding him to enter upon the premises of said *B. P. Tuell* and search for said heifer, and, if found, to bring said heifer and the body of said *Tuell* before him, the said *Downing*, or some other justice of the peace, to be disposed of and dealt with according to law; that on, &c., the warrant was delivered to the defendant *Fislar*, constable as aforesaid, who by virtue thereof entered upon the premises of the plaintiff, and, on search being made, found said heifer, which he took into his possession, and also arrested the plaintiff, &c., which is the same supposed trespass in the declaration mentioned, &c.

The special plea of *Downing* alleges, that by virtue of the affidavit of *Wrink*, he issued a warrant commanding the constable to search the premises of *B. P. Tuell*, &c.

Fislar pleaded the facts set forth above, and alleged that, by the authority of the warrant against *B. P. Tuell*, he arrested the plaintiff, &c.

The plaintiff filed general demurrers to the special pleas, and the demurrers were sustained. The parties then went to trial on the pleas of not guilty, and a verdict was given for the defendants. Motion for a new trial overruled, and judgment on the verdict.

The questions that arise in this case are as to the sufficiency of the special pleas, and the refusal of the Court to grant a new trial.

[*251] *In examining the matter of the pleas, we will first notice the plea of *Wrink*. The statement of that plea is substantially, that his (*Wrink's*) property was stolen as he believed, and that he had reason to suspect, and did suspect

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and believe, that it was concealed in and upon the premises of an individual whom he designated as *B. P. Tuell*; that he made oath to the facts before a justice of the peace, who issued a warrant to search, &c. The facts there stated acquit the defendant, *Wrink*, of a trespass. His property being stolen, and having reason to suspect that it was concealed in a certain place, he had a right to give to a magistrate information of those facts, and seek the aid of the law in regaining it. If true, and done without malice, no liability attached to him. If, however, he made the charge maliciously and without probable cause, the person whom he designed to harass has his remedy, but not by action of trespass. The remedy must be sought by an action on the case. *Elsee v. Smith*, 1 Dowl. & Ry., 97. This point was also examined and recognized by this Court in *Lair v. Abrams*, 5 Blackf., 191.

The plea of *Downing* also presents a valid defense to the action. It is only necessary to say, in reference to that plea, that it appears from it that the warrant issued by *Downing*, did not command the constable to arrest the plaintiff.

The two last named pleas amount, in the view we take of them, to the general issue, and would have been bad on special demurrer.

The demurrer to the plea of *Fislar* was correctly sustained. He justified the arrest of the plaintiff by virtue of a warrant against *B. P. Tuell*. It is settled law, that in warrants in criminal cases, as well as in indictments, the name of the party must be set out if known; if not known, such a description must be given as will identify the person intended. 2 Hale, 175; Foster's Cr. Law, 312; 1 Chitt. C. L., 39, 40.

It may be proper here to say, that the foregoing remarks relative to the liability of *Wrink* and *Downing*, are not intended to apply to any act of trespass committed by them, or either of them, after the warrant issued. If they assisted in arresting the plaintiff, or advised or directed him to be arrested, [*252] or to be detained after he was arrested, and that matter were properly put upon the record, they would be liable in this form of action.

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The refusal of the Court to grant a new trial is assigned for error. The record contains the testimony in the cause. The arrest of the plaintiff by *Fislar*, and his detention by the advice and counsel of *Downing*, were fully proved. There was no rebutting testimony, nor evidence offered in mitigation of damages. It is impossible to conceive on what principle a verdict was found in their favour. With regard to *Wrink* the testimony was not conclusive, and the jury having found a verdict in his favour, as they had a right to do, we are not disposed to disturb it. The Court erred in refusing to set aside the verdict. The hardship of such a course as it respects *Wrink*, who was found not guilty, might have been prevented by putting the plaintiff on terms, as was done in the case of *Price v. Harris*, 10 Bing., 331. The Court should have set aside the verdict and granted a new trial, on the condition that the plaintiff would enter a *nolle prosequi* as to *Wrink*, whom he had improperly joined in the suit.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. W. Payne, for the appellant.

W. T. Otto, for the appellees.

ALLEN and Others v. THE STATE, on the Relation of FRAVEL and Others.

OFFICIAL BOND.—The condition of the bond of a school-commissioner, that he will pay over to his successor, at the expiration of his term of service, all moneys which may then be in his hands, is broken if the commissioner die with school funds in his hands unaccounted for; and his successor in office may maintain an action on the bond against the sureties of such funds.

ERROR to the *LaPorte* Circuit Court.

DEWEY, J.—The State on relation of *Fravel* school-commissioner of *LaPorte* county, brought an action of debt on the official bond of *Arthur McClure*, his predecessor in office,

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against *Allen, Perkins, Blake, C. McClure, and O'Hara*, [*253] *the sureties of *Arthur McClure*, whom they had survived. The bond, as set out in the declaration is for the penalty of \$10,000, for the use of congressional townships in the county of *LaPorte*; and is conditioned "that if the above bounden *Arthur McClure* would truly and faithfully discharge the duties of the office of school commissioner of and for the county of *LaPorte* aforesaid, during his continuance in office; and would, at the expiration of his term of service, pay over to his successor in office all moneys which might be at that time in his hands for the use of congressional townships in said county, and which might have come into his hands by virtue of his said office; and deliver over to his successor all books and papers in his hands as commissioner as aforesaid," &c. Two breaches are assigned. The first was held insufficient on demurrer. The second alleges that *Arthur McClure*, as school commissioner, received the sum of \$1,500, arising from various designated sources, to the use of a certain township; that the relator, after the death of *McClure*, was appointed his successor, and was entitled to receive the money from him for the use of the township. It is then averred: "Yet the said *Arthur* in his lifetime did not, nor have the said defendants or either of them, since the death of the said *Arthur*, paid over to the said *Fravel*, the successor of the said *Arthur* as aforesaid, or to any other persons authorized to receive the same," the said sum of money, or any part of it, but have failed and refused and still do fail and refuse so to do; and have used and appropriated the same to their own use. There was also a general demurrer to this breach, which was overruled. A jury being waived, the Court found for the plaintiff \$593.36 in damages, and rendered judgment accordingly.

The sufficiency of the second breach is the question to be decided. One of the objects of the statute in pursuance of which the bond declared on was taken, is to render secure all moneys which school commissioners may receive by virtue of their office. The bond is, therefore, required to contain a condition that the commissioner shall deliver over to his suc-

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cessor all the money which may have come officially into his hands. R. S., 1838, p. 510. It is objected that this provision does not embrace a case like the present, because it is [*254] *impossible that a commissioner whose successor is not appointed until after his death, should deliver money to him. To suffer this objection, which is entirely literal, to prevail, would greatly impair the security of the school funds. It would evidently leave moneys in the hands of a commissioner dying while in office entirely without security other than what his effects might afford. Such a state of things, we think, could not have been in the contemplation of the Legislature when prescribing the condition of the commissioner's bond. Their intention doubtless was that the bond should secure the payment over to the proper officer of all the school funds remaining in a commissioner's hands at the termination of his service, however that event might be produced, whether by resignation, removal or death. The bond in question is sufficient for that purpose. Under this construction of the law and of the condition of the bond, the second breach is well assigned. It amounts to an averment that the deceased commissioner had in his hands at the time of his death, school funds to a certain amount, which he had not accounted for, and which belonged to his successor. This, we think, constituted a breach of his bond.

It has been urged that the judgment is for a greater amount than the evidence warrants. This objection is founded on the supposition that the State was not entitled, in this action, to recover more than the share of the school funds, received by the deceased commissioner, belonging to the particular township named in the declaration. The view which we have taken of the subject precludes this objection. The second breach of the condition of the bond must be considered as covering all the moneys in the deceased commissioner's hands at the time of his death. The sources from which they were derived, as set out in the declaration, show that they were school funds without reference to the particular township. That reference was not necessary and may be viewed as surplusage. It is

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also contended that the judgment is for too much, on the ground that it appeared in proof that the deceased commissioner had given two bonds with different sureties, and that a part of the money in his hands at the time of his death was received during the operation of the first bond, and [*255] prior to the date of that on which this suit is *founded.

We are not, however, called upon to discriminate between these two bonds, because the evidence shows that the commissioner received money enough, during the existence of the latter, to cover the judgment.

Per Curiam.—The judgment is affirmed with costs.

J. L. Jernegan, for the plaintiffs.

J. B. Niles and *J. H. Bradley*, for the defendant.

HARTSOCK v. REDDICK.

AFFIDAVIT FOR WARRANT NOT A LIBEL.—An affidavit, made before a magistrate to enforce the law against a person accused therein of a crime, does not subject the accuser to an action for a libel, though the affidavit be false, and insufficient to effect its object.

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—*Hartsock* sued *Reddick* for a libel, in charging him in writing with obtaining property by false pretenses. Among the pleas filed by the defendant are the general issue, and a special plea alleging that the supposed libel was an affidavit, made by the defendant before a justice of the peace, for the purpose of procuring a State warrant against the plaintiff, on a charge of having obtained the property, named in the affidavit, by false pretenses. Replication to this special plea *de injuria*, &c., and joinder. Verdict and judgment for the defendant.

The Court charged the jury—"If the paper in evidence (called the libel) is an affidavit made, sworn to, and regularly presented to justice *Webb*, of this county, for the purpose of obtaining from him a State warrant, on which to arrest and

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try the plaintiff for obtaining goods by false pretenses, this action for a libel can not be sustained." The propriety of this instruction is the only point in the cause.

There are several occasions, on which words may be spoken or written, that destroy the implication of malice, which would otherwise arise from the words themselves. Among these privileged occasions is a proceeding in due course of law. A complaint made to a justice of the peace, or other qualified magistrate, for the purpose of enforcing justice [*256] *against an individual therein accused of crime, does not subject the person making the accusation to an action for slander or libel. The foundation of this principle is the necessity of preserving the due administration of public justice. Few would be found to accuse, if the institution of an unsuccessful prosecution subjected the prosecutor to an action for words spoken or written. *Cutler v. Dixon*, 4 Rep., 14; *Lake v. King*, 1 Saund., 131; *Johnson v. Evans*, 3 Esp. R., 32.(1) And it makes no difference whether the charge be true or false; or whether it be sufficient to effect its object or not; if it be made in the due course of a legal or judicial proceeding, it is privileged, and can not be the foundation of an action for defamation. *Buckley v. Wood*, 4 Rep., 14; *Lake v. King*, *supra*; 1 Saund., 131, n. 1. Whether the affidavit, which is the foundation of this action, was made and presented to the justice by the defendant in a due course of law, was the matter put to the jury by the instruction of the Court in question; and it was correctly put.

Per Curiam.—The judgment is affirmed with costs.

C. Fletcher, O. Butler, and S. Yandes, for the appellant.

W. Quarles, H. Brown, and P. Sweetser, for the appellee.

(1) But an action on the case lies against any person who maliciously, and without probable cause, prosecutes another, whereby the party prosecuted sustains an injury, either in his person by imprisonment, in his reputation by scandal, or in his property by expense. *Savile v. Roberts*, 1 Ld. Raym., 374; Salk., 13. Thus, it lies for maliciously arresting and holding a party to bail. *Goslin v. Wilcock*, 2 Wils., 302; *Smith v. Cattel*, Id., 376; for maliciously suing out a commission of bankruptcy or of lunacy; *Chapman v. Pickersgill*, 2 Wils., 145; *Turner v. Turner et al.*, 1 Gow's R., 20; or for the malicious prosecution

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of a criminal charge before a magistrate or otherwise. *Secor v. Babcock*, 2 Johns., 203; 2 Selw. N. P. 1077 · 4 Rep., 14, n.; *Tuell v. Wrink et al.*, ante, 249.

ROBINSON v. TOUSEY.

PRACTICE.—The judgment in this case not showing against whom it was rendered, the writ of error was dismissed.

BILL OF EXCEPTIONS.—The transcript of a judgment of a justice of the peace of *B* county, on which a *scire facias* to have execution is issued by a justice of the peace of *C* county, is no part of the record of the suit by *scire facias*, unless made so by a bill of exceptions.

[*257] *ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—A *scire facias* was issued by a justice of the peace of *Decatur* county in favour of *Tousey*. It states that on, &c., the plaintiff obtained a judgment before a certain justice of the peace of *Dearborn* county against the defendant, &c., as by the transcript, &c., appears; and that the judgment was unsatisfied. It then requires the defendant to show cause why execution should not issue, &c. Pleas before the justice, 1, No such transcript; 2, The judgment is void. The justice gave judgment for the plaintiff, and the defendant appealed to the Circuit Court.

It appears by the transcript of the record of the Circuit Court, that the parties submitted the cause to the Court, and that the following judgment was rendered: "Now come the parties, by their attorneys, and the Court being advised, &c., consider that the said plaintiff have execution against the goods and chattels, lands and tenements, for the sum of \$75.83," &c.

This is not a judgment against *Robinson*, the plaintiff in error, nor against any other person. If, however, there had been a judgment against *Robinson*, it must have been affirmed. The transcript of the Circuit Court record shows nothing but the *scire facias*, the pleas, the submission of the cause to the

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Court, and the judgment; and in these proceedings there is nothing of which *Robinson* can complain.

It is contended, that the *scire facias* does not correctly describe the judgment upon which it is founded. But the transcript of that judgment is no part of the record before us, and, of course, we can not notice it. There is, to be sure, the transcript of a justice's judgment copied into the record, but that amounts to nothing. To have enabled *Robinson* to avail himself of the alleged variance, he should have had a bill of exceptions showing that the justice's transcript in question was offered in evidence by the plaintiff, that it was objected to, and the objection overruled. Had there been such a bill of exceptions, and a judgment against the plaintiff in error, the question respecting the variance would have been before us. But as the case stands, the writ of error [*258] *must be dismissed, there being no judgment upon which it could be issued.

Per Curiam.—The writ of error is dismissed with costs.

G. H. Dunn, for the plaintiff.

J. Ryman, and *P. L. Spooner*, for the defendant.

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The refusal of instructions to the jury (the record not showing them to be applicable to the case), can not be assigned for error.

If a person unlawfully injure another's property, he is liable for the damage without regard to the intention with which the act was done.

An erroneous instruction to the jury can not be assigned for error, if the verdict is sustained by the evidence.

A person who chases a horse out of his field with a large, fierce dog, commits an unlawful act, and is liable for any injury to the horse which that act occasions.

ERROR to the *Clark Circuit Court*.

BLACKFORD, J.—*O'Hara* brought an action of trespass for an injury done to his mare by the defendant. Plea, not guilty.

Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

The evidence shows the following facts: The defendant had a field in which corn was growing, inclosed by a good fence. The defendant, finding the plaintiff's mare in the field late at night, set his dogs on her, one a small dog, the other a large, fierce one, and thus drove her out of the field. The mare was bit in the nose by one of the dogs, and in running from them, had a snag run into her, which, in a day or two, caused her death.

The defendant moved the Court to instruct the jury, that if they believed from the evidence that the mare was trespassing on his field of corn; that he used ordinary care and diligence in driving her from the field; and that he did not intend to injure her; they should find for him. This instruction was rightly refused. There are two objections to it, 1st, It was not applicable to the case. There was no evidence, that the defendant used ordinary care and diligence in [*259] *driving the mare from his premises. The evidence on the subject is the other way; 2d, It was not essential to the support of the action, that the defendant intended to injure the mare. If a person unlawfully injure another's property, he is liable to an action for the damage, without regard to the intention with which the act was done. It is upon that principle, that even a lunatic is liable, *civilliter*, for a trespass against the person or property of another. *Weaver v. Ward*, Hobart, 134; *Haycraft v. Creasy*, 2 East, 92, *per* *Ld. Kenyon*.

The Court gave the following instruction: If the defendant hunted the mare from the field with a dog, and she was thereby injured, he is liable for the damages. This instruction was objected to. The law on the subject is stated in Bacon's Abr., as follows: If *J. S.* chase the beast of *J. N.* with a little dog out of land in the possession of *J. S.*, an action of trespass does not lie, inasmuch as *J. S.* has an election to do this, or to distrain the beast. But if *J. S.* chase the beast of *J. N.* with a mastiff dog out of land in the possession of *J. S.*, and any

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hurt be thereby done to the beast, this action does lie; the chasing with such a dog being unlawful." Bac. Abr. tit., Trespass, E. According to that doctrine, the instruction given was not strictly correct; but still we do not consider that to be a sufficient reason for reversing the judgment in this case. We have the evidence before us, and as it fully sustains the verdict, the objection to the instruction is not material. The evidence shows that the defendant chased the mare out of his field with a large, fierce dog, which was an unlawful act, and he must be held liable for the injury which that act occasioned.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. G. Marshall, for the plaintiff.

H. P. Thornton and *A. C. Griffith*, for the defendant.

[*260] *McFALL and Another v. WILSON and Others,
in Error.

TO a plea of failure of consideration, in a suit on a promissory note, a general replication that the consideration had not failed as alleged, is sufficient. *Farmer v. Fairman*, 5 Blackf., 257.

If the assignment of a patent right be not recorded in the office of the Secretary of State of the *United States*, a note given to the assignee for such right is invalid for the want of consideration. *Higgins v. Strong et al.*, 4 Blackf., 182.

If a declaration on a promissory note contain the common counts, and there be judgment by default for the plaintiff, there must be a writ of inquiry, unless the parties submit the case to the Court, or a *nolle prosequi* be entered as to the common counts. *Wood v. Lemon*, 1 Blackf., 198, note.(1)

(1) The same point was decided in *Wingate v. Ellis*, at this term.

The State, on the Relation of Bird, v. Hood and Another.

THE STATE, on the Relation of BIRD, v. HOOD and Another.

WRIT AMENDED BY PRÆCIPE.—The clerk having omitted to state in a *capias ad respondendum* the nature of the action or the amount claimed, it was held that the mistake might be amended by the *præcipe*.

APPEAL from the *Huntington* Circuit Court. The clerk omitted to state in the *capias ad respondendum* which issued in this case, either the nature of the action or the amount claimed.

SULLIVAN, J.—This case comes before us on an appeal from the judgment of the Circuit Court quashing the *capias ad respondendum* in the cause, and dismissing the suit. On the day to which the cause was set for trial, a motion was made to quash the writ. The plaintiff thereupon moved the Court for permission to amend the writ by the *præcipe* on file. The Court refused the plaintiff's motion, ordered the writ to be quashed, and gave final judgment for the defendants.

The mistake in the writ was evidently a clerical one, and the Court should have permitted the plaintiff to amend it.

Carr v. Shaw et al., 7 T. R., 295; *Walker v. Hawkey*, 5 *Taunt., 853; 1 Tidd's Pr., 104. It is contended, that there was nothing on file or on the record to amend by; but the indorsement on the writ shows that the plaintiff, by a *præcipe*, had given proper instructions to the clerk. It is the uniform practice of the Courts to correct such mistakes in furtherance of justice.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the appellant.

P. Sweetser, for the appellees.

Gentry v. Bargis and Wife.

GENTRY v. BARGIS and Wife.

REPLEVIN- PLEADING.—A plea in replevin, relying on the defendant's seizure of the goods as a constable under an execution against a third person, should aver the property of the goods to be in such third person.(a)

SAME.—A declaration in replevin by husband and wife, should show specially the wife's interest in the goods.

SAME.—A plea in replevin of property in a stranger, or in the defendant, denies the plaintiff's property in the goods, and gives the plaintiff a right to begin.

CHARGING JURY.—Special charges to a jury, which are included in a general charge previously given, should be refused.(b)

ERROR to the *Wayne* Circuit Court.

DEWEY, J.—Replevin by *Bargis* and wife against *Gentry*. The declaration alleges the goods and chattels detained to belong to the plaintiffs, and lays joint damages. The defendant pleaded, 1st, Property in one *Tolhelm*; 2d, Property in himself; and, 3d, A justification under an execution against *Tolhelm* on which the defendant, as a constable, seized the goods and chattels in question in the possession of *Tolhelm*, and as his property. The plaintiffs replied to the first two pleas, property in themselves, upon which there were issues of fact; and they demurred to the justification generally. The Court sustained the demurrer, and rendered an interlocutory judgment for the plaintiffs. Upon the issues of fact, the jury found a part of the property to belong to the plaintiffs, and a part to the defendant; judgment accordingly. On the trial, the defendant claimed the right to open the cause, but the Court gave it to the plaintiffs.

[*262] *As to the demurrer, we think the Court decided correctly that the plea was bad. It was no answer to the declaration to say that the defendant, acting as a constable under the execution, found the goods and chattels in the possession of the execution-debtor, and took them as his property. This might be true, and the property still belong to the plain-

(a) *Riddle v. Parke*, 12 Ind., 89; 1 Id., 34.

(b) *Dearmond v. Dearmond*, 12 Ind., 455

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tiffs, as they allege. The plea should have contained an averment, that the property did actually belong to the execution-defendant.

But the demurrer reaches the declaration, and it becomes necessary to examine whether *that* be sufficient. It alleges a joint ownership of the goods and chattels in the plaintiffs; but it does not show the *manner* of the wife's interest. It is in general true that husband and wife can not, during coverture, be the joint proprietors of personal property. The interest of the wife is transferred by the marriage to the husband. But there are instances in which they may join in replevin. This is the case where the property of the wife has been wrongfully taken or detained while she was sole. But when they join in this action, the special reason for making the wife a party must appear in the declaration; her title must be shown. If this is not done, the declaration is bad upon general demurrer. Bull. N. P., 53; Bac. Abr. Replevin, G.; *Serres et ux. v. Dodd*, 2 N. Rep., 405. It is true, in this last case the demurrer was special in form, but the cause assigned, that the right of the wife to join in the action was not shown, went to the substance of the declaration, and the Court sustained the demurrer on that ground. The declaration in the record merely alleges that the goods and chattels belonged to the plaintiffs; it entirely omits to show *how* the wife was interested, and is, therefore, substantially defective. The judgment of the Court should have been for the defendant upon the demurrer.

There was no error in permitting the plaintiffs to open the cause to the jury. A plea of property in a stranger, or the defendant, is not in confession and avoidance of the action; it does not admit the allegation in the declaration, that the property belongs to the plaintiff, but denies it. It is in the nature of a special traverse; it states by way of inducement, that the property belongs to a stranger, or the defendant, [*263] *and traverses the ownership of the plaintiff. This throws the burthen of proof on the plaintiff, and entitles him to begin and close the cause to the jury. 3 Stark. Ev., 1295.

The State, on the Relation of Harsh, v. Scott and Others.

The Circuit Court, after having given a general charge to the jury, refused some specific charges asked for by the defendant, on the ground that they had been already given in the general charge. We think the fact was so. The plaintiff in error conceives the general charge contained an instruction, that when a vendor of goods remains a long time in possession after the sale, if the vendee shows he paid a valuable consideration for the property, *that*, of itself, is sufficient to rebut the presumption of fraud arising from the continued possession of the vendor. One part of the charge, indeed, seems to be liable to this construction. But taken as a whole, we do not think it conveys that idea, but leaves the consideration given by the vendee to be weighed, among other circumstances, by the jury in forming a conclusion on the question of fraud in the sale. We think the instructions to the jury viewed as a whole were correct, and not calculated to mislead the jury. The judgment, however, must be reversed on the ground already stated.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

J. B. Julian, for the defendants.

THE STATE, on the Relation of HARSH, v. SCOTT and Others.

ARGUMENTATIVE PLEA.—A declaration in debt on a justice's bond set out the condition, and assigned as a breach, that the justice had failed to discharge his duty by failing to issue an execution on a certain judgment. Plea, that the justice had not failed to discharge his duty as alleged in the declaration. *Held*, on general demurrer, that the plea was good, but that it might have been specially demurred to as argumentative.(a)

ERROR to the *Putnam* Circuit Court.

DEWEY, J.—Debt against a justice of the peace and his sureties, on his official bond. The bond is conditioned in the usual form, that the justice faithfully discharge the duties of

(a) *Miller v. Elliott*, 1 Ind., 484.

The State, on the Relation of Harsh, v. Scott and Others.

[*264] *his office, and pay over all moneys, &c. The declaration assigns three breaches of the condition substantially the same. Each breach alleges that the justice "failed to discharge his duty in this, to wit," and then proceeds to state with due formality, that he failed to issue an execution upon a certain judgment rendered by him. The defendants pleaded, "that the said *Scott* (the justice) has not failed to discharge his duty as justice of the peace, as in said declaration and the three several breaches is alleged." The plaintiff demurred generally. The Court overruled the demurrer, and rendered final judgment for the defendants.

The decision upon the demurrer was right. The plea meets a negative with a negative, and contains an argumentative denial of the matters alleged by the breaches assigned in the declaration. It would have been bad upon a special demurrer, but its defect, which is argumentativeness, is not reached by a general demurrer. In the case of *Hodgson v. The E. I. Co.*, 8 T. R., 278, several breaches were assigned in an action of covenant. A plea "that the defendants did not break their covenants in the said declaration specified," was held to be bad on a special demurrer, on the ground of its being argumentative. We can see no substantial difference between that plea and the one in the record. Argumentativeness in a plea is a defect reached only by special demurrer. 1 Chitt. Pl., 540; *Spencer v. Southwick*, 9 Johns., 314. There is a strong analogy between this plea and that of covenants performed generally. This latter plea is allowable in some cases, as for instance, to debt on a bond conditioned for the performance of covenants, when the covenants are all of an affirmative character; but if some of them are negative in their nature, the general plea to them is objectionable; the objection, however, must be taken by a special demurrer; and the reason is that the plea is argumentative. 1 Chitt. Pl., 536.

Per Curiam.—The judgment is affirmed at the costs of the relator.

C. P. Hester and *B. Champer*, for the plaintiff.

A. Kinney and *S. B. Gookins*, for the defendants.

Halsey v. Hazard.

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*HALSEY v. HAZARD.

PROMISSORY NOTE AS A DECLARATION.—Debt by an assignee against the maker of a promissory note. *Held*, that the note and an assignment in full might, by statute, be filed in the place of a declaration.

SAME—PRACTICE.—The plaintiff in such suit may prove (the note not being indorsed as filed), that he had, ten days before the term, delivered the note and assignment to the deputy clerk to be filed in lieu of a declaration; and the Court may direct the clerk to mark the note as filed on the day it was delivered to his deputy.

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *David Hazard*, assignee of *James Conwell*, against *James Halsey*. The defendant moved the Circuit Court to dismiss the suit for want of a declaration. The plaintiff thereupon, by leave of the Court, though the evidence was objected to, proved the following facts: Ten days before the then term of the Court, a promissory note and assignment, with a *præcipe* in the cause, were delivered to the deputy clerk, with instructions to file the note in lieu of a declaration. No notice of the filing of the note was given to the defendant. The note and assignment were as follows: “\$328. Due *James Conwell* or order \$328, ninety days after date, with six *per cent.* interest. Value received. *December 1, 1836. James Halsey.*” “For value received, I assign the within note to *David Hazard. November 10, 1838. James Conwell.*” Upon this evidence, the Court ordered the clerk to mark the note as filed at the time it was proved to have been delivered to his deputy, and overruled the motion to dismiss the suit. The defendant afterwards pleaded *nil debet*; the cause was submitted to the Court; and judgment rendered for the plaintiff.

There is no ground for reversing this judgment. The objection to the evidence, noticed in the record, was correctly overruled, and the order respecting the marking the note as filed, &c., is unobjectionable. The note and assignment in full were a sufficient cause of action, under the statute, without a declaration.

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Per Curiam.—The judgment is affirmed with five *per cent.* damages and costs.

W. W. Wick, for the plaintiff.

J. Ryman, for the defendant.

[*266] *BABCOCK v. CUMMINS and Others.

IMPRISONMENT FOR DEBT.—A debtor in the prison limits has the same right to apply for the benefit of the insolvent act as if he were in close confinement.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of debt against *Cummins* and others, on a bond conditioned that *Cummins* should continue within the prison limits, &c. The bond was given in a case in which *Cummins* had been committed to jail on a *capias ad satisfaciendum*, issued on the judgment of a justice of the peace. Breach assigned, that *Cummins* had escaped, &c. Plea, that *Cummins*, whilst in the prison limits, &c., exhibited his petition before two justices of the peace for his discharge, &c., pursuant to the act for the relief of insolvent debtors; that the justices thereupon issued their warrant to the jailer to bring *Cummins* before them, with a list of the executions with which he stood charged, the plaintiff having had notice, &c.; that *Cummins* was brought before the justices, and thereupon subscribed and delivered in a schedule of his whole estate, filed his bond, and took the oath required by the act for the relief of insolvent debtors; that thereupon the justices ordered that he should be discharged from custody; and that after such discharge, and not before, *Cummins* left the limits, &c. General demurrer to the plea, and judgment for the defendants.

We see no objection to this plea on general demurrer. There can be no doubt but that a debtor in the prison limits has the

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same right to apply for the benefit of the insolvent act, as if he were confined in the prison. R. S. 1838, p. 232.

Per Curiam.—The judgment is affirmed with costs.

R. A. Lockwood and *D. Mace*, for the plaintiff.

H. Allen, for the defendants.

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*THE STATE v. LITTLE.

BETTING—INDICTMENTS.—Indictment for unlawfully winning, &c., by betting on the result of an election. *Held*, that it was no objection to the indictment, that the time when the bet was alleged to have been made was after the day of the election.

SAME.—An averment in such indictment, that the defendant did unlawfully win of, and take from, one *N. G.* two notes, &c., by betting on the result of the election, shows, with sufficient certainty, that the bet was made with *N. G.*(a)

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—The defendant was indicted for, that on the 6th day of *August*, 1840, at, &c., he did then and there unlawfully win of, and take from, one *N. G.* two promissory notes commonly called treasury notes, of the value of five dollars each, by then and there betting upon the result of the *August* election in *Marion* county for senator, &c. The Court, on motion of the defendant, quashed the indictment.

Two objections are urged against the indictment. The first is, that the election was held on the 3d of *August*, and not on the 6th as alleged; and that the betting is laid three days after the result of the election. The second objection is, that the indictment does not sufficiently show who were the parties to the bet.

Neither objection is tenable. It is sufficient to say in reply to the first objection, that the day named in the indictment is not material, provided the time stated be previous to the finding of the indictment. But if it were necessary to prove the

(a) *Parsons v. The State*, 2 Ind., 499.

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time as it is alleged, a wrong date can not avail the defendant on a motion to quash. As to the second, we think the indictment is sufficiently certain. The averment that the defendant did win of, and take from, *N. G.* two notes, &c., by betting on the result of the election, does, by necessary implication, mean that the bet was with *N. G.*

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

H. Brown, for the defendant.

[*268] *LIVINGOOD v. LIVINGOOD and Another, Administrators.

SET-OFF—STATUTE OF LIMITATIONS.—Matter pleaded as a set-off is not, to the amount of the plaintiff's demand, barred by the statute of limitations: but to so much of the set-off as exceeds the plaintiff's demand, the statute is a bar.^(a)

SAME.—To a suit commenced in *October*, 1840, on a single bill dated the 1st of *November*, 1833, and payable six years and nine months after date, the defendant pleaded payment and set-off. The plaintiff replied that the matter of set-off did not accrue within five years next before the 1st of *November*, 1833. Held, on general demurrer, that the replication was insufficient.

ERROR to the *Miami* Circuit Court.

DEWEY, J.—Debt by the administrators of *Peter Livingood* against *Christopher Livingood* on a single bill, dated *November* the 1st, 1833, for the payment to the intestate of \$200 in six years and nine months. The suit was commenced in *October*, 1840. The defendant pleaded, 1st, Payment, with a set-off which consisted of an account amounting to \$260 the particulars being stated; 2d, That the plaintiffs were not administrators. To the first plea the plaintiffs replied, that the cause of set-off "did not accrue within five years next

(a) *Fox v. Barker*, 14 Ind., 309.

Livingood v. Livingood and Another, Administrators.

before the 1st day of *November*, 1833." The defendant demurred generally to the replication, and the Court overruled the demurrer. An issue of fact was formed upon the replication to the second plea, upon which there was a trial, finding, and judgment for the plaintiffs.

The only question presented for our consideration, is as to the sufficiency of the replication of the statute of limitations to the plea of payment and set-off.

There is a proviso to the statute of limitations, which exempts from the operation of that act so much of any matter pleaded as payment or set-off, as shall equal the amount of the plaintiff's demand; R. S., 1838, p. 447; and by a subsequent law it is enacted, "that a replication of the statute of limitations to any such plea of set-off, shall only operate to prevent a recovery by the defendant or defendants of any excess of the amount of such plea, over and above what the plaintiff or plaintiffs may be entitled to in said action." R. S., 1838, p. 462. These two provisions are substantially the same. It is the object of both to prevent the statute of limitations from operating upon so much of the set-off as shall equal

the plaintiff's demand; the excess, if any, is barred; [*269] *and it is immaterial though the matter of set-off, had it been prosecuted by suit, would have been barred at the date of the cause of action against which it is pleaded. Neither of the statutes referred to prescribes any change in the form of a replication of the statute of limitations to a plea of set-off; and perhaps none is necessary. But the better practice would be, to adapt the replication to the provisions of the statutes, and confine it to so much of the set-off as is necessary to meet the adverse claim, leaving the excess to be answered in some other manner.

In the cause before us, the set-off exceeds in amount the demand claimed in the declaration, and the replication is to the whole plea. But it is not necessary for us to consider whether it is bad for that reason, because it is materially defective for another cause. It states, that the cause of set-off did not accrue within five years next before the 1st day of

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November, 1833, which is the date of the instrument on which the action is founded. Now the plaintiffs' right of action did not accrue, nor was the suit commenced, until near seven years after that period. The subject-matter of the plea might have originated in the interim. The replication is therefore no answer to the plea; and the demurrer should have been sustained.

A bill of exceptions states, that, on the trial of the issue of fact, the plaintiffs were suffered to give in evidence a printed paper "in the words and figures following," without proof of its genuineness, and against the objection of the defendant; but the paper is not spread upon the record. No question can be raised by such a bill of exceptions; it is a mere blank.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. W. Ewing, R. Brackenridge, and P. Sweetser, for the plaintiff.

C. Fletcher, O. Butler, and S. Yandes, for the defendants.

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*DUNCAN, Assignee, v. COX.

BETTING—VOID CONTRACT.—Two persons made a bet of goods of the value of \$100 on the result of a Presidential election, and each executed his promissory note to a merchant for that sum, the payee, with notice of the facts agreeing to furnish the goods to the winner. The loser was to pay his note, and the winner's was to be void. After the election, a suit on the note given by the loser was brought by an assignee. *Held*, that though the goods had been delivered to the winner by the payee of the note, the suit could not be sustained, the consideration of the note being illegal.(a)

ERROR to the *Morgan Circuit Court*.

BLACKFORD, J.—This was an action of assumpsit brought by *Duncan*, assignee of a promissory note, against *Cox*, the maker. The note was for the payment of \$100, was dated the

(a) See *Woodcock v. McQueen*, 11 Ind., 14.

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21st of *September*, 1840, and was payable on the 25th of *December* following. Pleas, the general issue, and want of consideration. Replication in denial of the special plea. The cause was submitted to the Court.

The evidence was as follows: At the time the note was given, *Cox*, the maker of the note, and another person, at the store of *Simms*, the payee of the note, contracted with *Simms* for goods of the value of \$100, to be delivered by *Simms* to *Cox*, provided Mr. *Van Buren* should be elected President of the *United States*; but if General *Harrison* should be elected to that office, then *Simms* was to deliver the goods to the said other person. Thereupon, *Cox* executed the note sued on, and the other person gave *Simms* another note for the same amount. Only one of the notes was to be paid, and on the following condition: If *Harrison* should be elected, *Cox* was to pay the note he executed, and the other note was to be void: but if *Van Buren* should be elected, then the other person was to pay his note, and *Cox's* note was to be void. The notes were deposited with *Simms*, to whom they were payable. General *Harrison* was elected. The witness, *Stevens*, who testified to the above-named facts, refused to answer the question, who was the other person referred to in his testimony? on the ground, that his answer would criminate himself. Between the 25th of *December*, 1840, and the 21st of *February*, 1841, the said witness, *Stevens*, received from *Simms'* store goods to the amount of \$93.44; and he had previously received other [*271] *goods out of the store. On the 21st of *February*, 1841, he was credited on *Simms'* books with \$100 "by the assumption of *Cox*," the defendant. The plaintiff moved the Court to strike out all the testimony given by *Stevens*, because he refused to state with whom the defendant made the bet; but the motion was correctly overruled.

The Court gave judgment for the defendant.

As the defendant proved that the note sued on was not to be paid unless General *Harrison* should be elected President, and the goods should be delivered to the person with whom the defendant made the bet, it was for the plaintiff to show,

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not only that *Harrison* had been elected, but also that the goods had been delivered to the winner. There was no proof, however, that the goods were so delivered; there was evidence that they were delivered to *Stevens*, but it was not shown that he was the person who made the bet with the defendant. The judgment is right, therefore, on account of this defect in the plaintiff's evidence. But, supposing the goods to have been delivered to the winner, there is another question in the cause arising under the general issue; and that is, whether the note sued on was not void on the ground that the consideration was illegal? The betting on the result of an election is prohibited by statute, (Rev. Stat., 1838, p. 324); and the payment of a bet, therefore, either by the loser himself, or by any other person for him at his request, with notice of the facts, is a violation of the statute. In the case before us, the note was given in consideration of the delivery of goods as mentioned in the record, the payee knowing the circumstances. Such consideration was illegal because the delivery of the goods, made with notice, was for an unlawful purpose, viz., the payment of a bet on the result of an election.

The following cases support this opinion: A person sold and delivered certain drugs to a brewer knowing they were to be used in the brewery; and it was held that he could not recover the price. The reason was, that there was a statute prohibiting brewers from using anything but malt and hops in the brewing of beer. *Langton v. Hughes*, 1 M. & Selw., 593. It has been also held that money lent for the purpose of paying losses on illegal stock-jobbing transactions, [*272] *to which the lender was not a party, and which money was applied by the borrower to that purpose, could not be recovered back. This decision was made on the ground that the payment of such losses was prohibited by statute. The Court said that, as the statute prohibited the payment, the making of the payment was an unlawful act, and if it was unlawful for one man to pay, it was unlawful for another, with notice, to furnish him with the means of payment. *Cannan v. Bryce*, 3 Barn. & Ald., 179. Again, in a

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suit on a lease of certain tenements, the defendant pleaded that the lease was entered into by the plaintiff and defendant, and that the premises were let to the defendant for the express purpose of being used by the latter in drawing oil of tar and boiling tar, contrary to the provisions of the statute of 25th of Geo. the 3d; and the plea was held to be good. *The Gas Light and Coke Co. v. Turner*, 6 Bing., N. C., 324.

These authorities show that if, in the case we have to decide, the payee of the note had sold and delivered the goods to the defendant for the express purpose of enabling him to pay the bet, the sale and delivery being for an unlawful object, would have been illegal. It follows, of course, that the direct delivery of the goods by the payee to the winner, expressly in discharge of the bet, at the defendant's request, must be also illegal. That being the case, the payee's performance of a precedent condition, viz., the delivery of the goods to the winner, without which there could be no pretense to a suit on the note, gave no right of action on it, such delivery being an unlawful act.

Per Curiam.—The judgment is affirmed, with costs.

C. P. Hester, for the plaintiff.

J. Eccles, for the defendant.

BOON and Others v. MURPHY and Another.

VENDOR AND PURCHASER—WAIVER OF LIEN.—The vendor of real estate, by taking the vendee's promissory note for the purchase-money, payable at a future time, with a third person as surety, waives his equitable lien on the land for such money, unless there be an express contract that the lien shall be retained.(a)

[*273] *ERROR to the *Shelby* Circuit Court.

SULLIVAN, J.—This was a bill brought by the de-

(a) *Gargan v. Shimer*, 26 Ind., 365; 1 Id., 102; 1d., 382.

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defendants in error, to subject a tract of land lying in the county of *Shelby*, sold by *Murphy* to one *Cummins* and by *Cummins* to *Boon*, to the payment of a part of the purchase-money. The bill states that *Murphy* sold a tract of land lying in *Shelby* county to one *Richard S. Cummins*, since deceased, for the sum of \$2,000, to be paid in installments as follows, viz., \$300 on the 1st day of *May*, 1838; \$850 on the 25th of *December*, 1838; and \$850 on the 25th of *December*, 1839; and for the payment of which, *Cummins* executed to *Murphy* his three promissory notes payable as aforesaid, with *Samuel Walker*, his co-plaintiff, as surety; that *Murphy* thereupon conveyed the land by a general warranty deed to *Cummins*. Before the first note to *Murphy* became due, *Cummins* sold and conveyed the land to the defendant *Boon*. The bill alleges that *Boon*, at the time of his purchase from *Cummins*, had notice that no part of the purchase-money had been paid by *Cummins* to *Murphy*. There are averments in the bill, that the notes given by *Cummins* and *Walker* were not taken in payment, but only as evidence of the amount due, and with the "confidence and expectation" that *Cummins* would not dispose of the land, or, if he did, that the purchase-money would be applied to the payment of his debt to *Murphy*. *Cummins* has since died, as the bill alleges, insolvent, and his heirs and legal representatives are, with *Boon*, the defendants to the bill. *Walker* unites with *Murphy* as a co-plaintiff in this suit, and sets forth in the bill, that judgments have been obtained against him, as the surety of *Cummins*, for a large part of the purchase-money; and that he was induced to sign the notes on the assurance of *Cummins*, that the land should remain subject to the payment of the purchase-money.

There was a demurrer to the bill which was overruled, and the defendants were required to answer.

The answers admit the sale by *Murphy* to *Cummins*, at the price and on the terms named in the bill; that but a small portion of the purchase-money has been paid; and that *Cummins* has died insolvent. They also admit the sale by *Cummins* to *Boon*. They deny that there was any agreement

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[*274] *between the parties, that the vendor should retain a lien on the land for the purchase-money, but aver that he looked for payment to the security taken at the time. The answer of *Boon* admits, that, at the time he purchased the land from *Cummins*, the latter informed him that all the purchase-money had not been paid to *Murphy*, and that he was also informed that he (*Cummins*) had given security to *Murphy* for the payments, and that there was no incumbrance on the land.

The cause was submitted on bill, answers, and exhibits; the Court decreed in favour of the complainants, and ordered the land to be sold for so much of the purchase-money as remained unpaid.

The right of the vendor to an equitable lien on land sold for the purchase-money, in the hands of the vendee, or of a purchaser with notice has been recognized by this Court, and is now universally admitted. This implied lien, however, may be waived or abandoned. What amounts to a waiver or abandonment, is a question about which there has been great diversity of opinion. It has been held that taking the bond of the vendee for the purchase-money, payable at a future day, was a discharge of the lien. *Fawell v. Heelis*, Amb., 724. And in the more recent case of *Winter v. Lord Anson*, where the vendee gave his bond for the purchase-money payable at the death of the vendor, and the interest thereof to be paid annually, the Vice-Chancellor said it was evident, that the intention of the vendor was to part with the estate immediately, and to wait for the purchase-money until a future day, consequently there was no lien on the land. 1 Sim. & Stu., 434. This latter case, however, was subsequently reviewed by the Lord Chancellor and overturned, 3 Russ., 488; and there are numerous decisions by the *English* Courts, which deny that merely taking the bond or note of the vendee for the purchase-money repels the lien, and the current of the authorities is against that opinion.

In deciding this case, we are not required to determine whether the bond or note of the vendee, without other security,

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discharges the vendor's lien. We are, on the facts submitted, to consider whether the implied lien is gone, when the purchase-money is to be paid by installments at distant [*275] *periods, secured by the responsibility of a third person, and there is no agreement between the parties that it shall be retained. Where a distinct and independent security is taken, the authorities cited below show that the lien is abandoned, unless there is an agreement to the contrary. Is the note of the purchaser, secured by an indorser, such a distinct security as repels the lien?

The *English* cases, it is admitted, do not satisfactorily answer the question. They do not determine that, in such a case, the lien is gone; nor do they determine that it does, under such circumstances, exist. In *Gilman v. Brown*, 1 Mason's R., 191, Judge *Story* remarked, that, "on a careful examination of all the authorities, he did not find a single case in which it had been held, if the vendor took a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note with a surety or an indorser, or a collateral security by way of pledge or mortgage, that, under such circumstances, a lien existed on the land itself." It is not necessary that we should review the *English* cases. They are reviewed in *Gilman v. Brown*, *supra*, and in the adjudged cases hereafter referred to. The point has been fairly met in the Courts of our own country, and, with one or two exceptions, there has been a uniformity of decision which, we think, should settle the question.

In *Gilman v. Brown*, above cited, the property sold was a large body of uncultivated land. The purchasers gave negotiable notes for the purchase-money secured by indorsers, payable at a future day. The Court held that here was a distinct and independent security. There was no pretense, the Court remarked, that the notes were a mere mode of payment, for the indorsers were, by the theory of the law, and in fact, conditional sureties for the payment. The case was put on the broad ground, that the security of a third person was taken as such, and that extinguished any implied lien for the purchase-money. That case was carried to the Supreme Court of the

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United States, where the decree of the Circuit Court was affirmed. The Supreme Court, in reference to the fact that the notes, for which the vendors stipulated, were indorsed by persons approved by themselves, said that it was a [*276] collateral security on which the vendors *relied, and which discharged any implied lien on the land itself for the purchase-money. 4 Wheat., 255. In *Wilson v. Graham's Ex'or.*, 5 Munford, 297, the Court of Appeals of *Virginia* decided, that no lien existed in favour of a vendor, who took the bond of the vendee for the purchase-money, in which a third person joined as security. In *Kentucky*, the same doctrine prevails. *Francis v. Hazlerigg's Ex'ors.*, Hard. Rep., 48.

In *New York*, the doctrine has been fully considered and settled. The Chancellor in the case of *Fish v. Howland et al.*, 1 Paige, 20, after reviewing numerous decisions on the subject, both in the *English* and *American* Courts, arrives at the conclusion that the lien is waived, whenever any security is taken on the land or otherwise for the purchase-money, unless there is an express agreement, that the equitable lien on the land shall be retained. Chancellor *Kent*, from a survey of all the authorities, *American* and *English*, expresses the opinion, that taking a note, bill, or bond, with distinct security, or taking distinct security exclusively by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the vendor does not repose on the lien, but upon the independent security, and it discharges the lien. 4 Kent's Comm., 153, *et seq.*

We are aware, as before stated, that there are a few cases repugnant to those above cited, but the weight of the authorities is in favour of the opinion, that the law gives no lien in favour of the vendor of an estate, where the note or bond of the vendee, with a third person as security, is taken for the purchase-money, unless there be an express agreement that the lien shall be retained. In the case under consideration, there was no evidence of such an agreement. The allegation in the bill, that there was such an understanding between the parties to the sale, is denied in the answers.

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The case is not strengthened by making *Walker* a complainant. If *Murphy* waived the lien, which the law would have given him but for his own act, the apprehension of *Walker* that he is in danger of having the money to pay, can not restore it.

[*277] **Per Curiam*.—The decree is reversed with costs.

Cause remanded, &c.

S. Major, for the plaintiffs.

C. Fletcher, *O. Butler*, and *S. Yandes*, for the defendants.

TANNER v. SWEARENGEN and Co., in Error.

A *SCIRE FACIAS* against bail, issued by a justice of the peace in the name of *Swearengen* and *Co.*, as plaintiffs, was held to be bad. *Hughes v. Walker, Carter and Co.*, 4 Blackf., 50; *Codding v. Moore et al.*, 5 Id., 601.

THE STATE v. DENISTON.

REFUSING TO ASSIST OFFICER.—The refusal, without a sufficient excuse, to assist a constable in preventing the escape of a person in his custody, is an indictable offense.

SAME.—The indictment in such case must show, that the defendant was informed of the official character of the constable.

ERROR to the *Franklin* Circuit Court.

DEWEY, J.—This was a prosecution for refusing to aid a constable in the service of process. The indictment alleges that a justice's warrant was duly issued, directed to a certain constable, who was thereby commanded to arrest a certain person; that the process was placed in the constable's hands, and that by virtue thereof he arrested the person therein named, and had him in legal custody; that the person so arrested

attempted to escape; that the defendant was present, upon whom the constable "called to assist him in the execution of his said office of constable as aforesaid, to prevent the said *Joshua Harris* (the person arrested) from escaping from the custody of him, the said constable, under the said warrant;" and that the defendant, "without showing or having any sufficient cause for not obeying the said requirement of the said constable, did, then and there, obstinately and [*278] *unlawfully refuse," &c., whereby the person arrested escaped, &c. The Court, on the motion of the defendant, quashed the indictment.

The decision of the Circuit Court is attempted to be defended, on the ground that it is not indictable to refuse to aid a constable in the execution of his office.

We do not think this position can be sustained. By an act respecting the appointment and duty of constables, it is provided that, "in discharging their duty in any respect whatever, constables may call to their aid the power of the county, or such assistance as may be necessary." R. S., 1838, p. 145. By another statute, it is enacted that "any person or persons called upon by any sheriff, or other officer, to assist in the execution of his office, and failing to obey when so called, shall, unless he shows sufficient cause for not obeying, be fined on indictment," &c. R. S., 1838, p. 566. The expression, "other officers," includes constables. It is, therefore, criminal to refuse to aid them, on their request, in the due execution of their office, unless the person called upon for aid can show a sufficient excuse for his disobedience.

The indictment in the record, however, is defective. Indictments of this kind should show that the person refusing assistance to the constable, was informed of his official character; otherwise the indictment is insufficient. 2 Chitt. C. L., 145, n. Id., 151, 2. This knowledge is not averred in the present instance; and the indictment was correctly quashed.

Per Curiam.—The judgment is affirmed.

H. O'Neal, for the State.

J. M. Johnston, for the defendant.

CROCKER v. DUNCAN.

PRIVILEGE FROM ARREST.—If a party to a cause be arrested on process in a civil suit, in coming to, attending upon, or returning from Court, he may be discharged by *habeas corpus*, or on motion in the Court from which the process issued.

SAME.—If a suitor be arrested in two cases, in one of which he is privileged from arrest, and in the other not, a motion to discharge him entirely from custody should be overruled.

[*279] *ERROR to the *Fountain* Circuit Court.

DEWEY, J.—During the *March* term, 1841, of the *Fountain* Circuit Court, and on the 18th day of *March*, *Crocker* made his affidavit, setting forth that, on the 16th day of that month, “during the sitting of the Court,” he was arrested by the sheriff upon a *capias ad respondendum* issued from that Court in favour of *Duncan*, and that he was then (on the 18th), held in custody by virtue of the arrest; that he was defendant in a cause in which one *Putnam* was plaintiff, then pending in Court, and he wished then (on the 18th), to attend to said cause. He further deposed, that he had on that day, while attending to his cause with *Putnam*, been arrested by virtue of a writ of *ne exeat* in favour of *Duncan*; wherefore, he moved the Court to discharge him from the custody of the sheriff. The motion was overruled.

A party to a suit is privileged from arrest on civil process, while going to, attending, and returning from Court; and if his privilege be violated, he is entitled to be discharged from custody by *habeas corpus*, or upon motion, before the Court whence the process issued. R. S., 1838, pp. 467, 8.(1) But we do not think the affidavit discloses enough to bring *Crocker* within the provisions of the statute, as respects the first arrest. He states, indeed, that he was arrested during the sitting of the Court, but he does not show at what place, or that the arrest took place while he was attending, going to, or returning from Court. This was necessary to entitle him to the privilege granted by the statute. He says, that two days after

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he was arrested he wished to attend to his business in Court, but that is not enough. The affidavit may be sufficient to entitle him to a discharge from custody under the *ne exeat*, for he shows he was arrested on that, while attending to his business in Court. But the motion was to discharge him entirely from custody. It was properly overruled, on account of the insufficiency of the affidavit as to the first arrest.

Per Curiam.—The judgment is affirmed with costs.

W. M. Jenners and R. A. Chandler, for the plaintiff.

R. C. Gregory, for the defendant.

(1) But a party thus privileged from arrest, may be served with process on which no bail is required; and though he may be discharged from [280] custody when arrested on a *capias ad respondendum*, the suit should not be dismissed; the case remains as if the process had been a summons and no bail required. Where a *capias*, containing an *ac etiam* clause for a malicious prosecution, had been served on the defendant, who was privileged from arrest as a suitor, he was required, not to give bail, but to indorse his appearance or be committed. He indorsed his appearance, and afterwards moved the Court to vacate the same. *Savage*, C. J. The defendant, as a suitor, was undoubtedly privileged from arrest; but here was not an arrest; for though the *capias* contained an *ac etiam* clause, bail was not demanded. Had bail been required, all the relief the party would have been entitled to, would have been to be discharged on filing common bail. The indorsing of an appearance is equivalent to filing common bail. No more was therefore asked of the defendant, than this Court would have required, on application to them, had he been compelled to give bail when the *capias* was served. *Hopkins ads. Coburn*, 1 Wend., 292.

COWDEN and Another v. KERR and Another.

PRISON-LIMITS.—That part of the prison-limits in *Jefferson* county which adjoins the *Ohio* river, extends no further than to low-water mark.(a)

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was an action of debt against *Cowden* and another on a bond, conditioned that the principal obligor

(a) *Gentile v. The State*, 29 Ind., 409.

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would continue within the prison-limits of *Jefferson* county, &c. Breach, that the prisoner went beyond the limits, &c. Plea in denial of the breach. The cause was submitted to the Court, and judgment rendered for the plaintiffs.

The prison-limits extend, by statute, to the boundaries of the respective counties; R. S., 1838, p. 465; and we are therefore to inquire, whether the prisoner went out of *Jefferson* county, which county is bounded on one side by the *Ohio* river. The evidence on the subject was, that the prisoner being a wharf-master at *Madison*, went with his wharf-boat about one-third of the way across the *Ohio* river, and beyond low-water mark, to receive freight from a steamboat, &c.

There can be no doubt in this case. The boundary of *Jefferson* county is the same with that of the State, as far as the county is bounded by the *Ohio* river; and it is settled that the boundary of the State on that river is the low-water mark of the river. *Handley's Lessee v. Anthony*, 5 Wheat., [*281] 374; **Stinson v. Butler*, 4 Blackf., 285. As the prisoner went on the *Ohio* river beyond low-water mark, he went out of the prison-limits, and thus committed the breach of his bond which is assigned in the declaration.

Per Curiam.—The judgment is affirmed, with two *per cent.* damages and costs.

J. G. Marshall, for the plaintiffs.

M. G. Bright, for the defendants.

 McINTOSH v. SHOTWELL and Others.

REPLEVIN-BAIL.—A judgment of a justice of the peace, rendered previously to the 1st of *December*, 1839, and which had been replevied, is not within the act of 1840, authorizing an additional replevy in certain cases.(a)

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—*Scire facias* by the defendants against *McIn-*

(a) *Montgomery v. Pierson*, 7 Ind., 97.

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tosh as the replevin-bail of one *Lent*. The suit was commenced before a justice of the peace. The facts are, that a judgment was obtained by the defendants against *Lent* on the 11th day of *May*, 1839, for the sum of \$98. On the 19th of *July*, 1839, it was replevied on the docket of the justice by *Charles E. Sturges* according to the law then in force. On the 13th of *April*, 1840, the judgment not being satisfied, and the defendant supposing himself entitled to the additional stay provided by the act of the 24th of *February*, 1840, procured *McIntosh* to replevy the judgment for the term of four months from the 1st day of *March*, 1840, according to the provisions of that act. This suit was against *McIntosh* on the replevy last mentioned, and the Circuit Court gave judgment against him.

The only question is, whether the act of the justice in taking additional bail, was a valid act, so as to bind the plaintiff in error?

The act of *February* the 24th, 1840, provides for two classes of cases: 1, That all judgments rendered by a justice of the peace previously to its enactment, and which had not been replevied under the law then in force, might be replevied for the period of four months from the 1st day of [*282] **March* next following; 2, That on all judgments rendered by a justice subsequently to the 1st day of *December*, 1839, and which had been replevied, the judgment debtor might have a further stay of four months from the 1st day of *March* next following, provided he gave additional bail.

The judgment in favour of the defendants in error against *Lent*, did not come within either of the cases provided for by the act. It was rendered in *May*, 1839, and replevied by *Sturges* in the month of *July* following, and the statute did not embrace judgments rendered previously to the 1st day of *December*, 1839, that had been replevied.

There being no law to authorize the replevy by *McIntosh*, we are of opinion it was a void act. It is only by statutory law, that judgments in our Courts can be replevied. The length of time for which they may be replevied, and the manner of

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doing it, as prescribed by the statute, must be observed to make it a valid act.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

W. Wright, for the defendants.

LOWE and Another v. BLAIR and Another.

PRACTICE.—In an action against *A, B, and C*, on a joint promissory note, a suggestion on the record that it was made known to the Court that *A* was not found, is sufficient to authorize the plaintiff to proceed against *B and C*, they having appeared to the action and pleaded.

PLEADING.—A plea beginning in bar and concluding in abatement, is a plea in bar.

AGREEMENT NOT TO SUE.—An agreement not to sue for a limited time on a promissory note, is no bar to a suit on the note commenced within that time.(a)

ERROR to the *Decatur* Circuit Court. The defendants in error were the plaintiffs in the Circuit Court.

DEWEY, J.—Debt against three defendants on a joint promissory note. As to one of the defendants, the following entry was made on the record: “It is made known to the satisfaction of the Court, that *Samuel G. Lowe* is not found. The other defendants appeared, and pleaded an agreement on [*283] the part *of the plaintiffs, not to sue on the note for twenty years from the date of the agreement, which was in 1839. The plea *begins* in bar, *concludes* in abatement, and is sworn to. The plaintiffs demurred generally as to a plea in bar; and the defendants joined in demurrer as in bar. The Court sustained the demurrer, and rendered final judgment against the two defendants who pleaded.

It is contended the judgment is erroneous. 1, Because there was not such a suggestion of “not found” as to one of the

(a) *Thalman v. Barbour*, 5 Ind., 178.

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defendants, as would authorize a judgment against the others; 2, Assuming the plea to be in abatement, because the judgment, on sustaining the demurrer, should have been *respondeat ouster*, and not final.

1, With regard to the first point, we think the entry on the record that it was made known to the Court that one of the defendants was "not found," was equivalent to a suggestion, that such was the officer's return, which is all the statute requires to justify a judgment against those defendants on whom process was served, or who appear to the action. R. S., 1838, p. 446. 2, The other point is also against the plaintiffs in error. The plea under consideration is a plea in bar. A plea commencing in bar, and concluding in abatement, is a plea in bar. Bac. Abr. Abatement, P.; *Medina v. Stoughton*, 1 Ld. Raym., 593, *per Holt*. And Mr. Serjeant Williams and Mr. Chitty lay down the law to be, that a plea beginning and ending in the form above stated, though it contain matter in abatement, is nevertheless a plea in bar. 2 Saund., 209, c, note 1; 1 Chitt. Pl., 460.

The inquiry stills remains, whether the demurrer to this plea was correctly sustained? The defense set up is, that the plaintiffs agreed with the defendants not to bring suit upon the note for a limited time—twenty years. Such an agreement, even had it been under seal, would not have constituted a bar. This point has been heretofore settled by this Court. *Berry v. Bates*, 2 Blackf., 118. See *Reed v. Shaw*, 1 Blackf., 245, n. 1, and the authorities there cited. See also *Cuyler v. Cuyler*, 2 Johns. R., 186; *Harrison v. Close et al.*, Id., 448.

[*284] **Per Curiam*.—The judgment is affirmed, with 5 per cent. damages and costs.

G. H. Dunn, for the plaintiffs.

P. Sweetser, for the defendants.

Crandall and Another v. The State.

CRANDALL and Another v. THE STATE.

RECOGNIZANCE.—A circuit judge may take a recognizance at his chambers, during the term of a Circuit Court, conditioned for the appearance, at a subsequent day of that term, of a party accused of a crime.

SAME—SCIRE FACIAS.—An order made at the term at which such recognizance is forfeited, that a *scire facias* issue commanding the recognizor *then and there* to appear, &c., does not vitiate a *scire facias*, reciting such order, founded on the recognizance and returnable to the next term.

APPEAL from the *Henry* Circuit Court.

DEWEY, J.—*Scire facias* against bail. The recognizance on which the action is founded was entered into by the defendants below, before the president judge of the sixth judicial circuit, on the 3d day of *May*, 1841, and is conditioned for the appearance of a person charged with forgery, on the next morning, at eight o'clock, before the judges of the *Henry* Circuit Court, to answer that charge, &c. The defendants pleaded, that the recognizance was taken during the Spring term of the *Henry* Circuit Court, on the evening of the third day of that term, after the Court had adjourned for that day. The plaintiff demurred generally to the plea. The Court sustained the demurrer, and rendered final judgment against the defendants.

It is contended that the recognizance is void, because it is conditioned for the appearance of the accused person before the Court which was in session when it was taken.

The objection is founded upon the phraseology of the statute authorizing the judges of the Circuit Court to take recognizances. The language of that act is, that all recognizances taken by those judges "out of Court, shall be returned to the next Circuit Court, to be holden in the county where the same is or may be taken." R. S., 1838, p. 162. We do not

[*285] consider this language incompatible with the *condition of the recognizance in this cause. The statute says nothing about the condition of the recognizance; but it is a fair presumption, that the legislature designed that the time

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for the appearance of the accused should correspond with that prescribed for the return of the recognizance, which we understand to be the Court which shall soonest be in session after the time of taking the recognizance. If the taking be in vacation, it is evident that Court must be the Circuit Court at its next term. But if the recognizance be taken by a judge at chambers, during the daily adjournment, it is equally evident, that the next Court to be holden will be that which will meet the next day, as it was that which was last holden on the day of the adjournment. A person having committed a crime during the session of the Circuit Court, is liable to be indicted and tried at that term. Why then not be recognized to appear at that term? We see nothing in the statute, and we are sure there is nothing in reason, against it.

Another objection to the *scire facias* was urged. The writ recites an order of Court, passed at the term at which the default of the defendants was entered, that a *scire facias* issue requiring them "*then and there*" to appear, &c. The writ was returnable to the next term. It is contended that this repugnant order vitiates the *scire facias*. We think not. The whole order may be stricken out as surplusage. The record of the forfeiture of the recognizance was a sufficient foundation for the writ.

Per Curiam.—The judgment is affirmed, with one *per cent.* damages and costs.

S. W. Parker, for the appellants.

H. O'Neal, for the State.

FORESMAN v. MARSH.

PROMISSORY NOTE—INSOLVENCY OF MAKER—PLEADING.—In a suit on the assignment of a sealed note for \$100, the declaration averred that the maker was insolvent. Plea, that the maker had real estate in the county worth \$200. *Held*, on general demurrer, that the plea was good.

SAME—DILIGENCE.—In such suit, a judgment of a justice of the peace against the maker on the note, and an execution returned no goods or

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chattels, do not show sufficient diligence against the maker to charge the assignor. (a)

[*286] SAME—PROOF OF SIGNATURE.—*The plaintiff in such suit need not prove the signature of the maker nor of a previous indorser.

PUBLIC RECORDS—EVIDENCE.—The county record book of deeds is admissible to prove a conveyance of real estate therein recorded, if offered by a suitor not being a party to the conveyance, nor appearing to have it under his control.

APPEAL from the *Tippecanoe* Circuit Court.

BLACKFORD, J.—*Marsh* brought an action of assumpsit against *Foresman*, on the assignment of a sealed note for the payment of \$100. The declaration contained three counts. The first, after describing the note and various assignments, &c., averred that the maker was wholly insolvent, and that a suit against him would have been useless. The second, after describing the note and several assignments, &c., averred that on, &c., the plaintiff obtained judgment before a justice of the peace against the maker, and on, &c., took out a *fiери facias* on the judgment, which was returned “no goods or chattels.” Pleas to the whole declaration: 1st, The general issue. 2d, That on, &c., the maker was seised of certain real estate in the county of the value of \$200. Pleas to the second count: 1st, That on, &c., the maker was the legal owner of certain town lots, &c. 2d, That on, &c., the maker was seised in fee of certain real estate, &c. General demurrers to the special pleas, and the demurrers sustained. The cause was tried on the general issue. Verdict and judgment for the plaintiff.

We think the first special plea to the whole declaration is substantially good. The first count relies on the fact that the maker was insolvent; and it was, therefore, a good answer in substance to that count, that the maker had real estate subject to execution. The second count is insufficient, and no plea to it was necessary. The second count is bad because it relies for showing due diligence against the maker on a judgment obtained against him on the note before a justice of the peace, and the return of an execution “no goods or chattels.” It should have

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appeared that the plaintiff, by means of a *scire facias*, had obtained an execution from the Circuit Court which would have reached real estate, and that the execution had been returned no property found; or there should have been an averment that the maker had no real estate subject to [*287] execution. There is no *occasion, therefore, to examine the pleas which were pleaded to that count alone.

On the trial, the defendant objected to the note and assignment as evidence, unless the plaintiff should first prove the signatures of the maker and prior indorsers; but the objection was correctly overruled. The suit was on the defendant's assignment, and could be sustained without proving the previous indorsements or the signature of the maker. That the maker's signature need not be proved in such case, is decided in *Free v. Hawkins*, Holt's Rep., 550; and that prior indorsements need not be proved, in a suit on the indorsement of a bill of exchange, is decided in *Critchlow v. Parry*, 2 Camp., 182.

The defendant offered to prove by the record book of the county, that the maker of the note was the owner of certain real estate, but the evidence was rejected. This evidence was admissible. The conveyance offered to be proved, not being to the defendant, nor appearing to be under his control, might have been proved by the record book. *Bowser v. Warren*, 4 Blackf., 522; *Dixon v. Doe d. Lasselle*, 5 Id., 106; *Doe d. Bowen v. Holmes*, Id., 319.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Jones, for the appellant.

ERWIN v. SHAW, in Error.

IF in an action of replevin commenced before a justice of the peace, the affidavit filed be such as the statute on the subject requires, no other statement of the demand is necessary. *Andre v. Johnson*, ante, 188; 22 Ind., 324.

James v. Nicholson.

[*288] *MERKLE v. BOLLES and Another, on Appeal.

SCIRE FACIAS issued by a justice of the peace against bail entered on the justice's docket for the stay of execution, &c. Plea, that the defendant did not become docket-bail for the stay of execution, &c., as alleged in the *scire facias*. *Held*, that the plea was substantially a plea of *non est factum*, and, if sworn to, was admissible; but that if not sworn to, it should be rejected on motion. *Riley et al. v. Harkness*, 2 Blackf., 34.

The issue on the plea of *nul tiel record* should be tried by the Court, and not by a jury. *White v. Elkin*, ante, 123.

JAMES v. NICHOLSON.

WANT OF DILIGENCE.—The assignee of a bond obtained judgment in time against the obligor, and, after a delay of seven months, took out a *feri facias* on the judgment. The obligor's real estate (being all the property subject to execution that he owned at the date of the judgment, or at any time afterwards) was sold on the execution, and a part of the debt thereby obtained. *Held*, that a suit could not, under those circumstances, be sustained on the assignment.

PRACTICE.—A demurrer to a declaration containing one good count should be overruled.

APPEAL from the *Montgomery* Circuit Court.

DEWEY, J.—Assumpsit. The two first counts of the declaration attempt to lay a cause of action by the assignee against the assignor of a single bill for the payment of money. These counts set out the contract, its assignment by the defendant to the plaintiff, the commencement of a suit by the latter against the maker of the bill, and the recovery of a judgment therein in due season. They also show, that seven months after the rendition of the judgment, a *feri facias* was issued which was levied upon certain real estate of the maker, and that a part of the money due by the judgment was thereby made. They

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then aver, "that from the rendition of the said judgment, up to and until the issuing and levying said execution, the maker of the bill had no goods or chattels, lands or tenements, subject to execution, other than *what was sold on said execution." The declaration also contains the common counts. There was a general demurrer to the whole declaration. It was sustained, and final judgment rendered for the defendant.

The only question of any interest presented by the record is, do the first two counts show the ordinary diligence, on the part of an assignee against the maker of a bond, requisite to render the assignor liable, or a sufficient excuse for omitting it?

We decided at the last term, in the case of *Bishop et al. v. Yeazle*, that a delay of six months to issue an execution on a judgment recovered by the assignee against the maker, without a sufficient excuse, discharged the assignor. Due diligence, therefore, is not shown on the present occasion.(1) Does the excuse exist? If it be admitted, that the same destitution of property on the part of the maker of an assigned bond, which would excuse an action against him by the assignee, will justify the omission to issue an execution on a judgment promptly obtained, the plaintiff in this cause has himself shown that the excuse did not exist. For it is impliedly admitted by the declaration, that at the time of the rendition of the judgment against him, and for seven months afterwards, the maker had available property. The general doctrine on this subject is well settled; it is, that the maker must, without delay, be prosecuted to an ineffectual judgment and execution, or that some good reason for not so doing—utter insolvency of the maker being one—must be shown. We know of no decision which has carried the privilege of the assignee beyond this. But we are now asked to go further, and to pronounce that although diligence was omitted for seven months, without any excuse for it, the assignee has still a recourse upon the assignor, because, at the expiration of that period, he seized all the property owned by the maker when the judgment was rendered, or afterwards. There certainly was a time after the rendition of

 McClure and Others v. Cole.

the judgment against the maker, and before the issuing of the execution, at which the conditional liability of the assignor to the assignee was gone, because there was a period when neither diligence, nor an excuse for it existed. We do not think his responsibility can be revived by a subsequent attempt [*290] at *diligence. If the doctrine contended for could be successful on the present occasion, a suit improperly delayed for seven months, or longer, should it ultimately secure all the property which a seasonable action could have reached, would be due diligence. Indeed, we do not perceive why the same reasoning would not dispense entirely with an execution, and a suit too, though the maker might have property, if it was sufficient to satisfy but a part of the debt, and the assignee should seek a remedy against the assignor only for the balance. We are unwilling to sanction a principle so lax, and so liable to abuse.

The demurrer, so far as the first two counts are concerned, was correctly sustained. But as there are other counts which are good, an error, inadvertent no doubt, was committed which must reverse the judgment.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory, for the appellant.

H. S. Lane, and *S. C. Willson*, for the appellee.

(1) Vide *Nance v. Dunlavy*, May term, 1844, and *Spears v. Clark*, November term, 1844, of this Court.

McCLURE and Others v. COLE.

PLEADING.—The holder of a bond for the payment of a specific sum with interest, may sue in debt for the principal alone, and need not notice in his declaration the contract for interest.

APPEAL from the *Dearborn* Circuit Court. The appellants were the defendants below.

 Jones and Others v. Gresham.

DEWEY, J.—Debt upon a writing obligatory for the payment of a specific sum of money at a specified time. The defendants craved *oyer* of the instrument declared on. It was a covenant corresponding with that set out in the declaration, with the following note subjoined: “The above to draw ten *per cent.* interest from date and until due.” The defendants demurred generally to the declaration. The Court [*291] *overruled the demurrer, and rendered judgment for the plaintiff.

It is contended there is a variance, because the declaration omits the stipulation respecting interest. Admitting the subjoined note respecting the interest to be a part of the original contract, this objection is not well taken. The demand of principal and interest, upon a covenant to pay a specific sum with interest, is divisible. *Verney v. Iddings*, 2 Chitt. R., 234. If the plaintiff chooses to demand the principal only, he has a right to do so; and he is bound to set out in his declaration no more of the covenant than that part on which he relies. The declaration in this cause describes the contract correctly as far as it goes.

Per Curiam.—The judgment is affirmed, with six *per cent.* damages and costs.

J. Ryman and *P. L. Spooner*, for the appellant.

D. Macy, for the appellee.

JONES and Others v. GRESHAM.

ATTACHMENT—PRACTICE.—If, in an attachment against a boat for materials, &c., the boat be released by the giving of a bond as prescribed by statute, the judgment for the plaintiff should be against the debtor personally. (a)

SAME.—But if no bond be given in such case, the judgment for the plaintiff should be for a sale of the boat.

ERROR to the *Carroll* Circuit Court.

(a) *Scott v. McDonald*, 27 Ind., 33, and cases there cited.

DEWEY, J.—This was a proceeding in attachment by *Gresham* against two boats, to enforce payment for materials furnished in building them. A regular affidavit having been made showing the indebtedness of *A. Jones, D. Jones, and J. Jones* to *Gresham*, for the materials with which the boats were built, a writ of attachment was issued upon which the boats were seized. The officer, who served the writ, incorporated into his return a bond executed by the *Joneses* in due form of law, in consequence of which the boats were released from the attachment. *Gresham* filed his declaration against the [*292] boats, showing that the materials for building *them had been furnished by him at the request of the *Joneses*, as the builders and owners of the boats; and that he had demanded of them payment of the debt, &c. The *Joneses* appeared, and pleaded in the name of the boats, denying the declaration. The Court rendered a judgment against the *Joneses* for the amount of *Gresham's* claim, and for costs.

It is contended that the judgment should have been against the boats, and not against the debtors.

The statute on which this proceeding is founded, does not expressly provide for any judgment, either *in rem*, or against the person indebted for materials, &c., in cases in which a bond has been given; but it clearly contemplates a judgment. It enacts, that if the master, owner, &c., of the boat or vessel seized, shall, before “final judgment,” give a bond in the manner therein prescribed, “conditioned to satisfy and pay all the demands pending against such boat or vessel, which shall be adjudged to be due and owing on the determination thereof, or pay the said demands together with the costs of the proceedings, the boat or vessel shall be thereupon discharged from arrest and detention.” R. S., 1838, p. 121. It would be idle to render a judgment *in rem*, when the property seized had already been discharged from the custody of the law, and restored to its owner. In such cases, the proper judgment is against the debtor personally. The bond stands as collateral security. If no bond has been given, the judgment should be for the sale of the property attached.

Hagerty v. Wood.

Per Curiam.—The judgment is affirmed, with six *per cent.* damages and costs.

J. Pettit, for the plaintiffs.

A. L. Robinson, for the defendant.

HAGERTY v. WOOD.

PLEADING.—A declaration in *indebitatus assumpsit* stated, that whereas the defendant on, &c., was indebted to the plaintiff in the sum of \$181, for work and labour, &c.; and was also indebted to the plaintiff in the further sum of \$181, for goods sold, &c.; the defendant afterwards, in consideration of the premises, promised to pay, &c.; yet, &c. *Held*, that this was one count only, and good on general demurrer.

[*293] *APPEAL from the *LaGrange* Circuit Court.

BLACKFORD, J.—Assumpsit. The declaration states that whereas the defendant, on, &c., was indebted to the plaintiff in the sum of \$181, for the work and labour of the plaintiff done and performed at the instance and request of the defendant; and was also indebted to the plaintiff in the further sum of \$181 for goods sold and delivered at the instance of the defendant; the defendant afterwards, in consideration of the premises, promised to pay the said sum of money to the plaintiff on request; yet the defendant hath not paid the said sum of money or any part thereof, to the plaintiff's damage, &c. General demurrer to the declaration, and judgment for the defendant.

The defendant contends that this declaration contains two counts, neither of which is good. We think, however, that there is but one count. The promise laid is to pay, &c., in consideration of the defendant's being indebted to the plaintiff for work and labour and for goods sold and delivered, &c. That constitutes but one count. The declaration is sufficient in substance.

Powers v. Hamilton.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

H. Cooper, for the appellant.

J. B. Howe, for the appellee.

POWERS v. HAMILTON.

ACCOUNT BOOK EVIDENCE.—A plaintiff may introduce his book of original entries to show that a note claimed by the defendant as a set-off had been credited to the latter in an account between the parties, proved to have been previously settled.

ERROR to the *Montgomery* Circuit Court.

DEWEY, J.—*Powers* sued *Hamilton* before a justice of the peace, on a promissory note dated *January* the 8th, 1838, for \$51.00, payable one year after date, on which there was a credit, under date of *January* the 1st, 1839, of \$14.00. *Hamilton* filed, by way of set-off, a promissory note against *Powers*, dated *April* the 14th, 1832, for \$100, payable on the 1st day of *April*, 1833. The cause was appealed to [*294] *the Circuit Court. Verdict and judgment in favour of the defendant for \$104.49.

On the trial, the plaintiff proved that he had been for a long time a trader in merchandise; that the defendant had dealt with him ten or twelve years; and that there had been no final settlement of their accounts until 1838, when a balance was struck in favour of the plaintiff, for which the defendant gave his note. The plaintiff then offered in evidence his book of original entries of the account which had been thus settled. The account contained a credit to the defendant of a promissory note payable to him for \$100, which credit was entered about the time the note filed as a set off fell due. The defendant objected to the evidence, and the Court excluded it.

In this, we think, the Court was wrong. The plaintiff had a right to prove, if he could, that the note filed by the defend-

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ant as a set-off had been paid or satisfied. That note had been payable about five years when the defendant executed the note on which this action is founded, and when the parties, on the settlement of their accounts, found a balance due to the plaintiff. If, in the account thus settled, there was a credit to the defendant of a note for the same sum as that of the note set up as a defense to the action, and the credit entered about the time of the maturity of the note, we think it was a proper circumstance for the consideration of the jury in forming their conclusion as to the justice of the defendant's demand. The fact alluded to could be legally proved only by the production of the book which contained the account and settlement. This is not permitting a party to introduce his account book for the purpose of establishing the propriety of *ex parte* entries in his own favour therein made, but in order to prove a transaction in which both parties participated. The settlement was as much the act of the defendant as of the plaintiff, and by it the former sanctioned the debits and credits embraced in the account; and it was proper for the jury to say whether, among the credits, was the note, the payment of which the defendant is now attempting to enforce by way of set-off. The plaintiff's account book of original entries should have been admitted in evidence for the purpose of showing the credit of the

[*295] note *for \$100, and that it was included in the mutual settlement of accounts between the parties.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory and *S. C. Willson*, for the plaintiff

R. A. Lockwood, for the defendant.

BARTLETT v. JENNISON.

MALICIOUS PROSECUTION—PLEADING.—A declaration in malicious prosecution alleged that the defendant falsely, &c., before a certain justice of the peace, charged the plaintiff with having wilfully and maliciously set on fire

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and burned a certain district school-house (naming the district, township, and county.) *Held*, that the allegation contained a legal description of arson.

APPEAL from the *Putnam* Circuit Court.

DEWEY, J.—This was an action for a malicious prosecution. The declaration charges that the defendant, “on, &c., at, &c., appeared before one *George Miller*, Esquire, then and there being a justice of the peace in and for said county, and authorized to keep the peace within the same, and to hear, &c.; and then and there before the said *George Miller*, being such justice as aforesaid, falsely and maliciously, and without any reasonable or probable cause whatever, charged the said plaintiff with having wilfully and maliciously, on, &c., at, &c., set on fire and burnt a certain district school house, in district number four, in *Franklin* township, in said county; and upon such charge, made in writing, and sworn to before the said *George Miller*, as such justice,” &c. The defendant demurred specially, assigning for cause that the plaintiff, “hath not alleged that the said defendant charged the said plaintiff, before the said justice *Miller*, with committing any offense by the legal name and description of that offense.” The Court sustained the demurrer, and rendered final judgment for the defendant.

We see no ground on which this decision can be sustained. It is supposed by the appellee that *Turpin v. Remy*, 3 Blackf., 210, sanctions it. The doctrine there established relative to this question, is, that in actions of this kind the declaration [296] should state the offense imputed to the plaintiff by its technical name, or by its legal description. Arson consists in “wilfully and maliciously” burning certain enumerated buildings. R. S., 1838, p. 210. This then is its legal description; and this description in reference to a school house is contained in the declaration. School houses are among the buildings specified by the statute; and if it be admitted that *public* school houses are meant, the statement in the declaration, “district school-house,” &c., fully satisfies that meaning: such a school house is a public one. The demurrer should have been overruled.

The President and Trustees of the Town of Connersville *v.* Wadleigh.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. A. Howard, for the appellant.

E. W. McGaughey for the appellee.

MASTIN *v.* CROSBY, in Error.

IN a suit on a promissory note by the payee against the maker, the defendant has no right, under the general issue, to give in evidence a writing on the back of the note, purporting to be an assignment of the note by the plaintiff, without proof of the execution of such writing.

CLIFFORD and Another *v.* WRIGHT, in Error.

A *SCIRE FACIAS* to have execution against real estate on a justice's transcript, which does not allege that the transcript had been entered on the docket of the Circuit Court, or that it had been filed in the clerk's office, can not be sustained

[*297] THE PRESIDENT and TRUSTEES of the TOWN of CON- NERSVILLE *v.* WADLEIGH.

PLEADING.—Assumpsit against The President and Trustees of the Town of Connersville. The first count was on a promissory note alleged to have been given for the price of a fire-engine; the others were for the price of a fire-engine sold and delivered. *Held*, that a plea that the engine was wholly useless and of no value whatever, wherefore the consideration had failed, was bad. *Held*, also, that the following plea, viz., The defendants say there is no body corporate and politic known and designated by the name

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and style of The President and Trustees of the Town of *Connersville*, was bad.

PRACTICE.—If in such action, the general issue and a plea in confession and avoidance be filed, the plaintiff can not have a verdict without proving, to the satisfaction of the jury, the matter alleged in the declaration.

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit in which *Wadleigh* was the plaintiff, and The President and Trustees of the Town of *Connersville* were the defendants. The declaration contained four counts. The first was on a promissory note, alleged to have been given by the defendants to the plaintiff in consideration of the sale, by the latter to the former, of a fire-engine. The other counts were for the price of a fire-engine, alleged to have been sold and delivered by the plaintiff to the defendants.

Pleas to all the counts: 1, Non assumpsit, without oath. 2, That the engine named in the declaration was warranted to work and perform well, &c.; but that it would not work and perform well, &c., and was of no value; that the consideration had therefore failed. 3, This plea was similar to the second, except that instead of averring that the engine was of no value, it alleged a notice to the plaintiff of its defects, and a request to him to take it away. 4, That the engine mentioned in the declaration was wholly useless and of no value whatever, wherefore the consideration had failed. 5, This plea is similar to the third. 6, The defendants say, there is no body corporate and politic known and designated by the name and style of The President and Trustees of the Town of *Connersville*; and this they are ready to verify. General demurrers to the fourth and sixth pleas, and the demurrers sustained. [*298] Replication to the second, third, and fifth *pleas, that the engine did work and perform well, &c.; and that therefore the consideration had not failed in manner and form, &c.

On the trial, the plaintiff gave the note in evidence, and the defendants introduced evidence tending to prove the truth of the pleas replied to. But what other testimony, if any, was

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given in the cause, the record does not inform us. The Court instructed the jury as follows: "The only question under the issue in this cause, submitted for your determination, is, whether this engine worked and performed well, and whether it answered the purposes of a fire-engine, &c. If it did, your verdict should be for the plaintiff for the amount of the note and interest," &c. Verdict and judgment for the plaintiff.

The fourth plea is bad, because it does not state either that the engine was warranted, or that there was a fraud in the sale. *Wynn et al. v. Hiday*, 2 Blackf., 123; *Phillips et al. v. Bradbury*, 3 Id., 388; *Kernodle v. Hunt*, 4 Id., 57. It is true, that where an article is sold by the manufacturer for a particular purpose, the buyer, in a suit for the price, may show a defect in the article in order to reduce the amount to be recovered; but the reason that he can do so is, there is always, in such sale, an implied warranty, that the article is fit and proper for the purpose for which it was purchased. *Jones v. Bright*, 5 Bingh., 533; 2 Stark. Ev., 1239. But in such cases, a warranty that the article was fit for the purpose to which it was to be applied, must be set out in the plea in the same manner as if there had been an express warranty to that effect.

The sixth plea is also bad. It amounts to this, that "The President and Trustees of the Town of Connersville" say there are no such persons as "The President and Trustees of the Town of Connersville." The admission in one part of the plea destroys the effect of the denial in the other.

The instruction to the jury is erroneous. The general issue being filed as well as the special pleas, there was no such admission on the record of the allegations in the declaration, as would excuse the plaintiff from proving them to the satisfaction of the jury. *Wheeler v. Robb*, 1 Blackf., 330. The Court, by informing the jury that the only question for them to determine was whether the engine performed well, [*299] *&c., must be understood as informing them that the matter charged in the declaration was proved, and that the general issue presented no question for their determination. In that the Court was mistaken. Whether the

matter so charged was proved or not, was as much a question for the jury to determine, as the other question named by the Court. Even if the instruction be considered as referring only to the first count, the objection to it still remains; for though the note was produced on the trial, and its execution not denied, yet the question whether the plaintiff ought to recover on the first count, under the general issue, though the engine performed well, &c., however plain that question might be, was for the jury and not for the Court to determine.

It may be that the verdict is right according to the evidence, and that therefore the defendant was not injured by the erroneous instruction; but we have no means of ascertaining whether that is so or not, as the record does not purport to contain all the evidence.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. B. Smith and *J. S. Newman*, for the plaintiffs.

S. W. Parker and *C. H. Test*, for the defendant.

BEAUCHAMP v. THE STATE.

CONSTITUTIONAL LAW.—The statute of 1838, which authorizes the presiding judge of one circuit to preside in and hold a Court for one term, or for a single trial, in another circuit whose presiding judge is absent, is not unconstitutional.^(a)

CRIMINAL LAW—INDICTMENT.—The caption of an indictment from the Circuit Court, represented the grand jurors that found the bill to be "good and lawful men." *Held*, that this was a sufficient description of the qualifications of the jurors.

SAME.—The caption in such case showed, that at, &c., on, &c., the jurors, (naming them) appeared in Court, and being duly sworn and charged, &c. *Held*, that the omission of the words "then and there" before the words "sworn and charged," was not material.

SAME—CHANGE OF VENUE.—An indictment, if the venue be changed, need not be recorded in the Court in which it was found.

SAME.—The record in this case showed, that the defendant was indicted in

^(a) *Beebe v. The State*, 6 Ind., 501.

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the *Vigo* Circuit Court for the murder of *G. M.*; that he pleaded there not guilty; that he procured a change of venue for his trial on that indictment to the *Parke* Circuit Court; that the clerk of the former Court handed [*300] over the *papers, and among them the indictment (which was spread on the record), to the clerk of the latter Court in which they were filed; that the defendant was placed on his trial in the *Parke* Circuit Court for the murder of *G. M.*, on the plea of not guilty theretofore entered in that behalf; that he made no objection to the indictment on which he was tried; and that the indictment, which was recorded in the last-named Court, and on which the defendant was tried, was the one which was transferred among the papers in the cause. *Held*, that these facts showed that the indictment found against the defendant in the *Vigo* Circuit Court, was the one on which he was tried.

CHALLENGE BY STATE.—The State, on the trial of such cause, has three peremptory challenges; and they may be made at any time between the appearance and swearing of the jury.

EXAMINATION OF WITNESS.—The defendant on such trial examined a witness respecting his character, who referred in his testimony to rumors that had followed the defendant as to his character in a neighborhood where he had formerly lived. *Held*, that the counsel for the State might thereupon cross-examine the witness, respecting the defendant's general character in his neighborhood as to his former conduct.(a)

IMPEACHMENT OF WITNESS.—If a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be supported by proving other statements made by him in accordance with it.

EMPLOYING COUNSEL TO PROSECUTE.—On the trial of an indictment for murder, the defendant was permitted to prove by the son of the deceased, who had been sworn for the State, that he, the witness, and the widow of the deceased, who had also been examined for the State, had employed counsel to assist the prosecuting attorney in the cause, but was not permitted to prove that the fee to be given for such assistance was on condition of a conviction. *Held*, that there was no error in this part of the case.

MURDER—INSTRUCTIONS.—The following instructions, there being evidence on the subject, were given in said cause to the jury. If homicide be committed in a sudden heat by the use of a deadly weapon, no provocation given by mere words will reduce the killing to manslaughter. The question should never be, was there anger merely? but, was there legal provocation to such anger? The use of a dangerous weapon under a provocation by words only, or under no provocation, is always evidence of malice aforethought. To constitute malice aforethought, it is only necessary that there be a formed design to kill; and such design may be conceived at the moment the fatal stroke is given, as well as a long time before. Malice aforethought means the intention to kill; and when such means are used as are

(a) *Perkins v. The State*, 4 Ind., 222.

Beauchamp v. The State.

likely to produce death, the legal presumption is that death was intended. *Held*, that these instructions were correct. (a)

ERROR to the *Parke* Circuit Court.

DEWEY, J.—The plaintiff in error was indicted in the *Vigo* Circuit Court for the murder of *George Mickelberry*. By a change of venue, on the application of the prisoner, the cause was transferred for trial to the county of *Parke*, which is in the seventh judicial circuit. Judge *Bryant*, the president [*301] of that circuit, being absent, Judge *McDonald*, the president of the tenth judicial circuit, took his place, and presided over the *Parke* Circuit Court during the trial of the prisoner, which terminated in his conviction and sentence of death. He prosecutes this writ of error to reverse the judgment.

Many objections to the legality of the proceedings of the Court below have been made. Some of them are important in themselves; and others derive an interest from their connection on the present occasion with the life or death of a human being. Aided by able argument of counsel on both sides of the cause, we have given to them all that serious and deliberate attention, to which a connection so grave and momentous entitles them.

1. It is contended that the *Parke* Circuit Court had no jurisdiction of the cause, on the ground that the president of another circuit presided over the trial.

This objection is founded on the alleged unconstitutionality of the statute, which authorizes the president of one circuit to preside over and hold a Court for one term, or for a single trial, in another circuit whose president is absent. R. S., 1838, p. 164. It is said that this law conflicts with the three first sections of the fifth article of the constitution. They are as follows:

“Sect. 1. The judiciary power of this State, both as to matters of law and equity, shall be vested in one Supreme Court, in Circuit Courts, and in such other inferior Courts, as the General Assembly may from time to time direct and estab-

(a) *Fahnestock v. The State*, 23 Ind., 231.

lish. Sect. 2. The Supreme Court shall consist of three judges, any two of whom shall form a quorum, and shall have appellate jurisdiction only, which shall be co-extensive with the limits of the State. Provided nothing in this article shall be so construed as to prevent the General Assembly from giving the Supreme Court original jurisdiction in capital cases, and cases in chancery, where the president of the Circuit Court may be interested or prejudiced. Sect. 3. The Circuit Courts shall each consist of a president and two associate judges. The State shall be divided by law into three circuits, for each of which a president shall be appointed, who, during his continuance in office, shall reside therein. The president, and associate judges in [*302] their respective counties, shall have *common law and chancery jurisdiction, as also complete criminal jurisdiction, in all such cases, and in such manner, as may be prescribed by law." This section prohibits the associate judges from holding Courts, in the absence of the president, for the trial of capital cases, and cases in chancery; and authorizes the Legislature to increase the number of circuits and presidents.

The position taken by the counsel for the prisoner is, that the proviso in the second section is to be viewed as a grant of a specific power to the Legislature, to provide for the emergency therein named in a particular manner, which must be strictly pursued, if that body act at all on the subject; and that it is a virtual prohibition to afford the remedy in any other manner. This position must be fatal to the law in question, if the Legislature possessed no other power to pass it, than that which is implied by the proviso. But they did possess other power; and it is to be found in the first section of the third article of the constitution, which is—"The legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives," &c. This is not a grant of special, limited, and enumerated powers, implying a negative of all others, as is the case with the constitution of the *United States*.

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The legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws. The inquiry is not whether the proviso confers a power upon the General Assembly, but how far the whole section restricts its power. The first clause of it certainly contains a restriction, and forbids the Legislature from conferring upon the Supreme Court original jurisdiction. The only office of the proviso is to make certain exceptions to the restriction. It confers no power. Were the whole section stricken out, the Legislature would be at liberty to confer either original or appellate jurisdiction, or both, upon that Court. Can it be claimed then, that because this section leaves the Legislature free to remedy an evil, which the convention foresaw, in one way, it forbids every other [*303] mode of relief? The Legislature *is competent to erect such other Courts besides the Supreme and Circuit, as it may see fit. Suppose it should establish in each county another tribunal with jurisdiction as ample as that of the Circuit Courts, might not that tribunal take cognizance of all capital cases and suits in chancery? We can not doubt it; and we see nothing in this section which forbade the Legislature, in the exercise of its general authority, to pass the law under review, though the effect of doing so is to do away the necessity of conferring original jurisdiction on the Supreme Court in any case, and though the emergency pointed out in the proviso is incidentally provided for by a mode of redress not therein indicated.

The argument against the validity of the law drawn from the third section has more force, but is not, we think, conclusive. The first branch of this section prescribes, that the Circuit Courts shall each consist of a president and two associate judges, without designating what president or what associates. The clause which does designate them is susceptible of two constructions without a violation of its letter.

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It may mean the resident president of his own circuit, or the president of any circuit, together with the two associate judges in their respective counties. If the provision that the president of each circuit shall reside therein, can be accounted for independently of a design to make him a component part of the Courts in his circuit, it is not clear that the spirit of this clause is not consistent with the latter interpretation.

We think it can be so accounted for. A president judge has many duties to perform without reference to his functions in Court, which render it very desirable that each citizen of his circuit should have easy access to him; such as granting injunctions, authenticating clerk's certificates, &c. Under this construction, the constitutionality of the law is placed beyond a doubt. But perhaps the other is the true reading, that is, the president of the circuit to which he belongs and the associate judges of that circuit in their respective counties shall constitute the Courts. Admitting this to be the sense, it remains to inquire, what is its effect upon the legislative authority of the General Assembly? It must not be forgotten, that the third section no more than the second

contains a grant of power. It is restrictive upon the [*304] general authority of the Legislature. It limits the number of the Circuit Court judges, designates the associates of each by reference to their residence, and requires the president to reside in his circuit. But does it take from the Legislature the right to empower a president, under any circumstances and for a temporary and specific purpose, to hold a Court in the circuit of another president? It is believed that the same rigid rule of criticism, which would construe this part of the constitution into such a prohibition, would deny to the Legislature the right to authorize the Circuit Courts to exercise any jurisdiction out of the counties in which they are held, the president out of his circuit, and the associate judges beyond the limits of their respective counties; and also, from conferring on the Circuit Courts other than common law (civil and criminal), and equity jurisdiction. Now, the constitution has received a

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practical construction, in these respects, coevil with the existence of the State. The first Legislature empowered the Circuit Courts to issue subpœnas and executions, and each of the judges in certain cases to issue warrants, into all the counties in the State; and the Circuit Courts were many years ago authorized to take the probate of wills, grant letters testamentary and of administration, &c, powers which do not pertain to common law or chancery jurisdiction. Whence did the Legislature derive their power to do this? Not from the section under notice, for that speaks only of common law and chancery jurisdiction. It derived it from its general power; and the constitutionality of none of the provisions above referred to has ever been doubted. Upon what principle of distinction is it that the law which is now doubted, is to be distinguished from these in regard to the right to pass it? Why is it that the General Assembly can authorize a president to send a valid warrant out of his circuit, but can not authorize him to hold a court beyond its limits? It was foreseen by the convention, that the interest or prejudice of a president judge would sometimes disqualify him from sitting in Court, and that the associates would be left without jurisdiction in capital cases, and chancery suits. Here, certainly, was a contingency on the happening of which the president was not expected, for the time being, to hold a Court in his own circuit. Now, what [*305] is there in the *third section to prevent the Legislature from supplying his place, while the disqualification lasts, by the president of another circuit? The latter surely might perform that office without removing his place of residence, and without ceasing to be a member of every Court held within his usual limits. This, we apprehend, is all that any construction of the third section can require.

We are by no means prepared to say that any part of the constitution, either in letter or spirit, so restrains the general authority of the Legislature as to prohibit it from passing the statute which we have under consideration. If, indeed, the framers of the constitution had rendered it necessary that the

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Supreme Court should try capital cases when the president of a circuit in which they may happen is interested or prejudiced, they would have entailed upon the country a very serious evil. The necessity of bringing juries, and witnesses, and parties from the remote parts of the State to the seat of government; the expense, the delay, the trouble, the great uncertainty in the administration of justice attendant upon such a trial, would produce a state of things which ought to be avoided if possible. The law in question does avoid it. Besides, this law has been in force about five years. Many important decisions in chancery, and some in capital cases, may have been made in Courts organized under it. If it be unconstitutional, all such proceedings are void. The consequences are evident. Before we can consent to open a door to them, we must have the fullest conviction that stern duty demands it at our hands. We have not that conviction. We are not satisfied that the general authority of the Legislature is so trammelled by any portion of the constitution as to be incompetent to pass this beneficial law. We had this subject under consideration on a former occasion, and after much reflection, came to the same conclusion which we now express. If the views here advanced do not leave the constitutional question in regard to this law free from all difficulty, we feel well assured they involve it in too much doubt to authorize us to declare the statute a nullity.

2. The next objection is that the grand jurors who found the indictment do not appear by the record to have been freeholders or householders.

[*306] *The caption of the indictment represents them to be "good and lawful men." This general representation of the qualifications of grand jurors has always been held to be sufficient, even when the record comes from a Court of special and limited jurisdiction; if it comes from a superior Court, even the omission of these words is not fatal, because all men shall be presumed to be "good and lawful" until the contrary appears. 1 Chitt. C. L., 333; Bac. Abr. Indictment, 1; 2 Hawk., c. 25, s. 17.

3. It is alleged there is uncertainty in the time and place of swearing and charging the grand jury. The caption shows that at the *May* term, 1841, of the *Vigo* Circuit Court, and on the third day of that month, the jurors (naming them) appeared in Court, and being duly sworn^d and charged, &c. The defect complained of is the omission of the words "then and there" before "sworn and charged."

The case of *The People v. Guernsey*, 3 Johns. Cases, 265, is relied on to support this objection. It appears to us that it has a contrary bearing. The omission of the words "then and there," in reference to the swearing and charging the grand jury, was, indeed, held to be a fatal defect in the caption of the indictment. But the decision turned on the fact that the record was certified from a Court of inferior jurisdiction, and it admitted that the law is otherwise when the indictment is from a superior Court. Our Circuit Courts are vested with public and very ample jurisdiction, and are not, in contemplation of law, inferior Courts. That writs of error lie to them from the Supreme Court does not give them that character. Writs of error run to the *English* Common Pleas from the King's Bench, and to both from the Exchequer Chamber; but these tribunals have always been ranked among the superior Courts, the highest indeed in the kingdom. The principal object of the caption is to show the jurisdiction of the Court in which the indictment was found. More certainty, therefore, is requisite when it is brought from a Court of special jurisdiction than when it comes from a superior Court. In the latter case, the omission of the words "then and there," in respect to the swear-

ing and charging the grand jury, is not fatal; and [*307] it may be well doubted *whether it is in any case.

1 Chitt. C. L., 334; 2 Hawk., c. 25, s. 126; Bac. Abr. Indictment, 1; Archb. C. P., 24.

4. It is next objected, that it does not appear the indictment found against the prisoner in the *Vigo* Circuit Court was recorded there; and, therefore, no evidence exists that

that indictment is identical with the one on which he was tried in the *Parke* Circuit Court.

The statute authorizing a change of venue directs, upon a change being ordered, that the papers in the cause shall be sent to the proper Court, the clerk of which is to docket the cause; the Court to which the venue is taken is to proceed as the other Court would, had no change taken place; R. S., 1838, p. 602. As the record is never made up until final judgment, which in this cause necessarily took place in the *Parke* Circuit Court, we do not think it was requisite to record the indictment in the *Vigo* Circuit Court. Nor do we see any difficulty as to the identity of the indictment. The record shows that the prisoner was indicted in the *Vigo* Circuit Court for the murder of *George Mickelberry*; that he pleaded there "not guilty;" that he procured a change of venue for his trial upon that indictment to the *Parke* Circuit Court; that the clerk of the former Court handed over the papers, and among them the indictment (which is spread upon the record), to the clerk of the latter Court in which they were filed; and that the prisoner was placed upon his trial in that Court for the murder of *George Mickelberry* upon the plea of "not guilty theretofore entered in that behalf." No objection was made by the prisoner to the indictment upon which he was tried. If more were wanting to establish the identity of the indictment, it is to be found in the statement in the record, that the indictment which was recorded in the *Parke* Circuit Court, and upon which the prisoner was tried, is the one which was transferred among the papers of the cause.

5. In impanneling the traverse jury, four jurors were called; three of them were accepted and one was challenged by the prisoner; and another was called and accepted by him; thereupon the State peremptorily challenged one of the first three, and the challenge was allowed.

There was no error in this. The State had a right to three peremptory challenges. *Wiley v. The State*, 4 Blackf., [*308] 458. *And either party may challenge at any time

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between the appearance and the swearing of the jury. 1 Chitt. C. L., 545.

6. On the trial, the prisoner produced a witness, who gave evidence as to his character, and made reference in his testimony to rumors that had followed him as to his character in a neighbourhood where he had formerly lived; upon which the counsel of the State asked the witness: "Do you know the general character of the prisoner in his neighbourhood, as to his former conduct?" An objection to the question was overruled. The witness answered in the affirmative, and said the prisoner's character was unfavourable. The admission of this testimony is alleged to be error.

The law is that, in prosecutions for crimes, the prisoner may call witnesses to his general character, and, afterwards, the State may rebut their testimony by proving his general character to be bad. Ros. C. Ev., 72, 73; 2 Stark. Ev., 304. It is usual to put the question as to the general character of the prisoner, in such a form as to have reference to the particular crime with which he is charged; but we have found no authority that it may not be asked in the unqualified form in which it appears in the record, leaving out the words "as to his former conduct." We consider those words as no qualification of the question. The general character which a person sustains always depends upon his previous conduct. Besides, the question was put in cross-examination, and it does not appear (whether it be considered as qualified or not) to have been irrelevant to the testimony which the witness had given for the prisoner. We think there was no error in suffering the question to be asked and answered.

7. The prisoner having proved that a witness for the prosecution had made former statements inconsistent with her testimony, the State was permitted, against the objection of the prisoner, to prove that the witness had also made statements corresponding with it.

We have had the question now presented under consideration on a former occasion. We then came to the conclusion, that if a witness be impeached by proof of previous

statements inconsistent with his evidence, he might be supported by showing other statements made by him [*309] agreeing with it. *Coffin v. Anderson*, 4 Blackf., 395; see, also, *Jackson v. Etz*, *5 Cowen, 314. On reviewing the authorities on this subject, we do not feel disposed to overrule this decision.

8. The prisoner offered to prove by the son of the deceased (who had been sworn for the prosecution), that he, the witness, and the widow of the deceased, who had also been examined by the State, had employed counsel to assist the attorney prosecuting for the State in conducting the prosecution against the prisoner, and had agreed to pay him a fee conditional on conviction. The evidence was objected to. The Court admitted proof of the employment of the assistant counsel, but rejected the testimony as to the character of the fee. The prisoner excepted.

Any circumstance tending to bias a witness for or against a party—such as natural kindred, affinity, fellowship in a common cause, or ill-will—is a matter proper for the jury in estimating the credit of a witness. In the cause before us, if the fact that the widow and son of the deceased had employed counsel against the prisoner, can be supposed to have evidenced a stronger bias in their feelings than must have necessarily grown out of their situation, he has had the benefit of that fact. Whether the fee was conditional or not, we think was entirely unimportant under the circumstances of the case.

9. It appeared in evidence, that the prisoner went to the house of the deceased to inquire into something which his daughter had said of him. They had an interview in which the prisoner became furiously angry, and uttered threats. While his wrath was yet high, the deceased entered the room and interposed, using the language of remonstrance. The prisoner drew a knife, and plunging it into his breast, killed him instantly. The blade of the knife was six inches long and one and a half wide. The prisoner immediately made his escape. The Court instructed the jury, that if homicide

be committed in a sudden heat by the use of a deadly weapon, no provocation given by mere words will reduce the killing to manslaughter; that "the question should never be, was there anger merely, but, was there legal provocation to such anger?" that the use of a dangerous weapon under a provocation by words only; or under no provocation, was always evidence of malice aforethought; that to [*310] *constitute malice aforethought, it was only necessary that there should be a formed design to kill, and that such design might be conceived at the moment the fatal stroke was given, as well as a long time before; that malice aforethought means the intention to kill; and that when such means are used as are likely to produce death, the legal presumption is that death is intended. To these instructions the prisoner excepted.

Two objections are urged against them, 1st, That it was incorrect to charge the jury, that mere words did not constitute a sufficient provocation to mitigate the killing a man with a deadly weapon, under the influence of sudden passion, to manslaughter; and, 2d, That the instructions improperly withdrew from the jury the right of determining with what intention the weapon was used.

With regard to the first objection, we have carefully examined all the cases referred to by the counsel for the prisoner, and thoroughly reviewed the whole current of authorities on this subject. It is useless to give them here in detail. There can be no doubt as to the result. It is, that no gestures or words of affront, however well calculated to arouse a just indignation, however furious the passion which they may actually excite, are an adequate provocation to alleviate homicide, effected by a deadly weapon, from murder to manslaughter. To have that effect, the provocation must consist of personal violence. Whether this rule be wise, whether it be the best which can be devised to guard human life from brutal rage, and at the same time to palliate human frailty, is not for us to say. We imagine, however, that society would be no gainer by substituting in its place a fluctuating princi-

ple, by which each man shall be judged according to the excitement natural to his peculiar temperament, when aroused by real or fancied insult given by words alone. That the law is as we have stated it, the following authorities most clearly establish. *Brains's* case, Cro. Eliz., 778; *Oneby's* case, 2 Lord Rayan., 1485; 1 Hawk., c. 31, s. 33; 1 East's C. L., 233; Fost., C. L., 290, 291; 1 Russ. on C., 435; Ros. C. Ev., 557. The question has been raised, whether our statute has not introduced a change into the law respecting manslaughter, in reference to this point of sudden heat and [*311] *provocation. We think not; the statute has adopted the common law definition of the crime, and does not alter any of the rules by which it is to be governed.

The second objection to the instructions is also without foundation. Express malice consists in a preconceived design to destroy life unlawfully, or do some great bodily harm, and may be evidenced by threats, lying in wait, &c. Here, the existence of the intention is a matter of fact to be found by the jury. "Implied or constructive malice," says Mr. *Starkie*, "is not a fact for the jury, but is an inference or conclusion founded on the particular facts and circumstances ascertained by them." 2 Stark. Ev., 711, 712. There is in every homicide implied malice, but facts and circumstances in alleviation, excuse, or justification, may be adduced, the truth of which it is the province of the jury to determine; but whether, if true, they be sufficient to rebut the implied malice, is a matter of law for the Court. Fost. C. L., 255. *Oneby's* case, *supra*; *Strange*, 773. When provocation is relied upon in defense, the nature of the weapon used by the prisoner in producing death is always an important consideration, as tending to show the presence or absence of malice. If a deadly weapon, that is, one likely to produce death, be used, the legal presumption is that death was intended, which is evidence of malice. Ros. C. Ev., 557; 2 Stark. Ev., 713, 722. We do not perceive that the instructions violate any of these principles, and believe them to be correct. With regard to the actual intention of the prisoner to kill the deceased,

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there is no room to doubt. The weapon was of the most deadly nature, and was aimed directly at the heart.

We have thus gone through all the objections raised against the legality of the prisoner's sentence; they were urged with much ingenuity, and have been maturely weighed. But, with more pain at the result, than difficulty in deciding, we are constrained to pronounce that the judgment of the Circuit Court must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

J. Whitcomb and *T. A. Howard*, for the plaintiff.

H. O'Neal, for the State.

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NOTICE OF PROTEST.—A promissory note payable at the branch at *LaFayette* of the State Bank was indorsed to the State Bank. The indorser, when the note and indorsement were executed, resided in said town, but was absent in another State when the note fell due. *Held*, that notice of the dishonour of the note, put into the post office at *LaFayette* by a notary, and directed to the indorser in that town, was insufficient.(a)

SAME.—If, when such a note falls due, the parties reside in the same town, and there be no penny post there, notice of the dishonour of the note should be personally given to the indorser, or left at his dwelling house or place of business.

SAME.—If the indorser in such case be temporarily absent, the notice should be sent to the house in which he last lived or did business.

SAME.—An allegation in the declaration in a suit against such indorser, that due notice had been given to him of the dishonour of the note, is not satisfied by proof of matters of excuse for not giving such notice.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by the State Bank of *Indiana*, as indorsee of a promissory note, against *Curtis* as the indorser. The declaration, which contains but one count, states that one *Robert Ward* had previously, viz., on, &c., at *Lafayette*, in *Tippecanoe* county, executed his promissory note for the payment to one *Robert Brown* or order, of a certain sum of money ninety days after date, negotiable and payable at the branch at *LaFayette* of

(a) 7 Blackf., 133; 12 Ind., 231.

the State Bank of *Indiana*; that, on the same day, *Brown* assigned the note to the defendant, and the latter, on the same day, assigned it to the plaintiff; that, after the note became due, viz., on, &c., it was duly presented at the said branch bank and payment demanded, but that no person whatever would pay the same, &c.; of all which said several premises, the defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. By means whereof the defendant became liable, &c. Plea, non assumpsit. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

The plaintiff, on the trial, produced the note and indorsements described in the declaration, and proved the due presentment of the note for payment at the branch bank, the non payment, &c., as averred in the declaration. He also

proved that, on the evening of the day of the pre-
[*313] sentment *and default, a notice of the same was put

into the post office at *La Fayette* by the notary, directed to the defendant at *La Fayette*; that the notary knew that the defendant, previously resident in *La Fayette*, had removed from there before the note fell due, but did not know whither he had gone; that the notary had made some inquiry, without effect, in order to ascertain to what place the defendant had removed. There was some evidence given of the defendant's having an office at *La Fayette* before his removal, of his removal, a short time before the note fell due, to *Massachusetts* without leaving an agent at *La Fayette*; of his having gone to *Massachusetts* merely on a visit, &c., which evidence, from the view we take of the case, it is not necessary to state more particularly. There were also some instructions to the jury asked for by the defendant and refused, and others given to which he excepted, which we have not found it necessary to examine.

There are two questions presented by this case as we have just stated it. The first is whether the notary's putting the notice into the post office at *La Fayette*, directed to the defendant at that place, was, under the circumstances, a legal

notice? If it was not, then, secondly, whether any matters of excuse for not giving to the defendant notice of the non-payment could sustain the allegation of notice contained in the declaration?

There is no dispute but that the defendant resided at *La-Fayette* when the note and indorsements were executed, and that he was absent in another State when the note became due; but whether his absence was intended by him to be permanent or only temporary is a point that is not very clearly settled by the testimony. Supposing the defendant to have been absent from *LaFayette* merely on a visit when the note fell due, without having left any agent there, (which, so far as concerns the notice is the most favourable view for the plaintiff of the testimony on the subject), the notice relied on can not be supported. When the parties reside in the same town, and there is no penny-post that goes to the part of the town where the indorser lives, the notice, instead of being put into the post office, must be personally given to the party, or left at his dwelling house or place of business. [*314] 3 *Kent's Comm., 107. It does not appear that there is any penny-post at *LaFayette*, and we can not presume that there is one; and, therefore, had the defendant not been absent, the notice in question would have been insufficient. The defendant's absence on a visit to another State could make no difference favourable to the plaintiff. As the notice could not then be given personally to the indorser, it should be sent to the house in which he last lived or did business. Supposing that the notice may, in such case, also be put into the post office if there be a penny-post, because of the presumption that it would be sent to the proper place in town; still, if there be no such post, the post office can not be resorted to.

Considering, therefore, the notice relied on to be void, we are next to examine the other question in the cause, viz., whether evidence of matters of excuse for not giving notice, such as the plaintiff's use of reasonable diligence, without success, to discover the defendant's residence, &c., can benefit

the plaintiff under the declaration he has filed? We think it can not. The declaration merely alleges that the defendant had notice of the non-payment of the note. That allegation is not proved by such evidence as that just mentioned. If the plaintiff wished to rely, not on the giving notice, but on matters of excuse for not giving it, those matters of excuse should have been specially alleged instead of the averment of actual notice. 2 Stark. Ev., part 1st, 229, note f; 1 Chitt. on Plead., 361, 362; Chitt. on Bills, 592; *Harris v. Richardson*, 4 Carr. & Payne, 522; *Blakely v. Grant*, 6 Mass. R. 386. The case of *Firth v. Thrush*, 8 Barn. & Cress., 387, cited by the plaintiff, does not aid him. There, the declaration averred notice, and the evidence showed that notice had been given—not as soon, to be sure, as in ordinary cases is required, but in due time under the special circumstances of the case. If in that case, as in this, no notice at all had been given, there is nothing in the opinions expressed by the judges to show that the plaintiff would not have been nonsuited.

The record of the cause before us, which contains all the evidence given, shows that there was no proof whatever of a material averment in the declaration, viz., that notice of the dishonour of the note had been given to the defendant; [*315] and the Court should, for that defect in the evidence, have granted a new trial.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

W. M. Jenners and *R. A. Chandler*, for the plaintiff.

Z. Baird, for the defendant.

ROSS v. THE STATE.

RECOGNIZANCE—WANT OF ATTEST.—A recognizance taken by a justice of the peace for the appearance before him, at a subsequent day, of a party accused of a crime, is not void for not showing that it was attested by the justice.

SAME.—Although a recognizance in such case be substantially defective a *scire facias* suggesting the defect may, by statute, be issued upon it; and the omission of such suggestion (the recognizance being copied into the *scire facias*), can only be taken advantage of, if at all, by special demurrer.

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SAME.—A recognizance in such case, purporting to be signed and sealed by the recognizer, and to have been acknowledged before the justice, is a sufficient foundation for a *scire facias*; and if the recognizance was not entered into by the party sued on it, so as to be obligatory on him, the objection should be made by plea.

SAME.—When such recognizance is in a sum beyond a justice's jurisdiction, and is forfeited, it should be certified to the Circuit Court; and a *scire facias* on it may, in such case, issue from that Court. (a)

ERROR to the *Rush* Circuit Court.

BLACKFORD, J.—On the 23d of *July*, 1841, *John H. Smith* made an affidavit before *Samuel Davis*, a justice of the peace, charging *Samuel Horney* with feloniously uttering, paying, &c., counterfeit money; on which affidavit a warrant issued against *Horney*, and was returned on the same day to *John Alley*, a justice of the peace, with the body of *Horney* in custody. A joint and several recognizance was thereupon entered into by *Horney*, *John Thompson*, and *Alexander Ross*, before justice *Alley* in the sum of \$200, to be levied on their and each of their goods and chattels, lands and tenements, conditioned for *Horney's* appearance before justice *Alley* on the 6th of *August*, 1841, at, &c., to answer the State on a charge of forgery, on the complaint of said *Smith*. *Horney* failed to appear according to the condition of the [*316] *recognizance, and the justice declared the recognizance forfeited.

A certified transcript of the above-named proceedings, with the recognizance, &c., was filed by justice *Alley* in the Circuit Court, on the 11th of *August*, 1841; and at the next *October* term of the Court, the said transcript, recognizance, &c., were, on motion of the prosecuting attorney, entered of record in the Court, and writs of *scire facias* were ordered to be issued against the recognizers. A *scire facias* was accordingly issued out of said Court against *Alexander Ross*, one of the recognizers, setting forth the above facts, and requiring him to show cause, &c. The defendant demurred generally to the *scire facias*; the demurrer was overruled;

(a) *Miller v. The State*, 8 Blackf., 315.

and judgment rendered against the defendant for the sum of \$200, with an award of execution for the same.

The first error assigned is, that the recognizance is not stated by the *scire facias* to be attested by the justice. The statute authorizes a justice of the peace, when his examination of a defendant charged with a crime, is postponed to a subsequent day, to cause the defendant to enter into a recognizance for his appearance before the justice on such day. R. S., 1838, p. 361. The recognizance before us was taken by virtue of that statute, and in a case contemplated by it. It was taken by the justice in the progress of the investigation before him, and is a part of the proceedings in the cause. This is shown by the *scire facias*, which contains a copy of the certified transcript of the justice's proceedings, which were signed by him. It is true, that the recognizance, which is set out *in hæc verba* in the *scire facias*, does not show that it was attested and approved by the justice as the statute requires. R. S., 1838, p. 361, sect. 4. If this omission in the recognizance be a substantial defect, the recognizance is not for that reason void. There is a statute saying, that when such a recognizance has not the substantial matter required by law, the principal and his sureties shall not on that account be discharged; but that they shall be equitably bound to the party interested; and that such party may, by action of debt or *scire facias*, in any Court of competent jurisdiction, suggest that such recognizance is defective, and recover, &c. R. S., 1838, p. 450.

[*317] The *scire facias* in question does not, *indeed, contain any suggestion of a defeat in the recognizance, but as the alleged defeat is apparent on the face of the *scire facias* in which the recognizance is copied, the omission of the suggestion could only be taken advantage of, if at all, by special demurrer.

The recognizance purports to be signed and sealed by the recognizors, and to have been acknowledged before the justice; it is therefore, at least under the statute last cited, a sufficient foundation for a *scire facias*. If the recognizance

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was not entered into by the defendant so as to be obligatory on him, the objection should have been made by plea.

The second error assigned is, that the *scire facias* could not issue out of the Circuit Court. This objection is also untenable. As the recognizance is for a sum beyond the justice's jurisdiction, and is binding on lands, the Circuit Court appears to us to be the proper tribunal out of which the *scire facias* should issue.

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman, R. C. Cox and P. S. Hackleman for the plaintiff.

H. O'Neal, for the State.

HELVEY v. THE BOARD OF COMMISSIONERS OF HUNTINGTON COUNTY.

COUNTY TREASURER—FAILURE TO ACCOUNT.—*A* was appointed a county treasurer for the year 1838, and, during his term of office, he and his deputy received a part of the county revenue in county orders. In 1841, the board of county commissioners brought an action for money had and received against *A* for the amount so received, he having failed to account for the same to said board. *Held*, that the action would lie. (*a*)

ERROR to the *Huntington* Circuit Court. This suit was commenced in the Circuit Court against *Helvey* in 1841.

SULLIVAN, J.—Assumpsit. The facts are, that *Helvey* was appointed, by the board of county commissioners, treasurer of *Huntington* county for the year 1838; that during the term of his appointment, the collector of the county and other persons paid to him and to his deputy, *Harlin*, as a [*318] *part of the county revenue, an amount exceeding \$500 in county orders; that in *May*, 1839, *Helvey* appeared before the board of commissioners, with county orders amounting to \$416, for the purpose of settling his account as treasurer, but could not do so on account of the absence of his deputy, *Harlin*; that *Helvey* left the orders in possession of one *Shearer* to be delivered by him to *Harlin*,

(*a*) *Tilford v. Roberts*, 8 Ind., 254.

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to assist him in settling the accounts of *Helvey* with the board; that in *June*, 1839, an attempt was made to settle, but no settlement could be made, and the orders were delivered by *Shearer*, according to *Helvey's* direction, to *Harlin*. The declaration contains two counts; the first is for money had and received; the second, on an account stated. Plea, non-assumpsit. By consent of parties, the cause was tried by the Court. Judgment for the plaintiffs.

The first objection taken to these proceedings is, that the board of commissioners had no right to bring this suit. It is contended that it should have been brought by the treasurer of the county, the successor of the plaintiff in error. We see nothing in the statute authorizing the treasurer to sue; but, by the express terms of the law, the commissioners are authorized to sue in all cases where the county is injured in its rights or contracts. On general principles also, the plaintiffs were the proper persons to sue. *The Board of Comm'rs of Gibson County v. Harrington*, 1 Blackf., 260; *Harper v. Ragan*, 2 Id., 39.

The next objection is, that, upon the foregoing facts, an action for money had and received is not maintainable. County orders are a species of security that, by the custom of the country, pass by delivery; and they are easily convertible into money. They are frequently used as money, and especially are they so used in payments to the county treasurer. It is true, that in the action for money had and received, it must in general appear that the defendant had received money properly belonging to the plaintiff, yet if property be received by him, which may be readily converted into money, a receipt of money by him may be presumed, until the contrary be proved. *Ainslie v. Wilson*, 7 Cowen, 662; *Hunter v. Welsh*, 1 Stark. R., 224; *Longchamp v.*

Kenny, 1 Doug., 137; *Tuttle v. Mayo*, 7 Johns. R., [*319] 132; **Hatten v. Robinson*, 4 Blackf., 479. From the

great lapse of time since the reception of the orders by *Helvey*, we think it might be presumed that they had been converted into money by him, or into that which had been

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received by him instead of it. The fact having been so settled by the proper tribunal, we are not disposed to disturb it.

The position taken by the plaintiff in error, that this suit should have been brought against *Harlan*, can not be maintained. The orders were in the first place received by *Harlan* as the agent of *Helvey*, and were delivered by him to his principal; and the subsequent delivery of them to *Harlan* by *Shearer*, was by the express direction of *Helvey*. In the case of *Stephen v. Badcock*, 3 B. & Adolp., 354, it was decided that a client could not maintain an action for money had, and received against his attorney's clerk, by whom money had been received in the absence of his employer belonging to the plaintiff. The reason given was that the clerk was accountable to his employer for the money, and that there was no privity of contract between the clerk and the plaintiff. On that point, the cases are analogous.

Per Curiam.—The judgment is affirmed, with five *per cent.* damages and costs.

H. Cooper and *T. Johnson*, for the plaintiff.

W. Wright, for the defendants.

MAHON v. GARDNER, in Error.

ON a trial in the Circuit Court of an action of assumpsit commenced before a justice of the peace, receipts and orders of the plaintiff for money, tending to prove payment of the demand, are admissible evidence for the defendant, though no plea have been filed; the evidence being admissible under the general issue, and the defendant in such case being entitled to the benefit of that plea, by statute, without pleading it.

[*320]

*McKINNEY v. HARTER.

PLEADING—VARIANCE.—The declaration in assumpsit brought by *A* alleged that the defendant by his note acknowledged himself indebted to

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the plaintiff in the sum of, &c. Held, that a note by which the defendant acknowledged himself indebted to the estate of *C D*, deceased, in the sum of, &c., was inadmissible on the ground of variance.

APPEAL from the *Decatur* Circuit Court.

DEWEY, J.—This was an action of assumpsit by *Harter* against *McKinney*. The declaration contains three counts. One of them alleges, “that the defendant made his certain promissory note in writing commonly called a due bill, by which he acknowledged himself indebted to the plaintiff in the sum of, &c., and delivered the same to the plaintiff, by means whereof the said defendant became liable to pay the plaintiff, &c., and being so liable, &c., promised the plaintiff to pay him,” &c. The other two counts raise no question. Plea, the general issue. Judgment for the plaintiff.

On the trial, the plaintiff offered in evidence the following instrument signed by the defendant: “\$136.50. For value received, due to the estate of *Thomas Eagar*, deceased, \$136.50, as witness my hand;” and he also offered to prove, that the defendant had said “that the note was just, that he owed the plaintiff the amount of it, that he gave the note to the plaintiff for goods purchased of him, as the administrator of the estate of one *Eagar*, deceased, or for goods purchased of *Eagar* in his lifetime, and that he would pay it.” The defendant objected to the admissibility of the writing, and of the parol evidence; but the Court admitted them.

We do not see on what ground the decision of the Circuit Court can be sustained. There was a variance between the writing set out in the declaration, and that offered in evidence. The one purported to be a promise or acknowledgment of indebtedness to the plaintiff, and the other to the estate of *Thomas Eagar*, deceased. The plaintiff contends, that the instrument is declared on according to its legal effect. But that the legal effect of the instrument in question is an undertaking or an acknowledgment of being indebted to the plaintiff, more than to any other individual, we are unable to perceive. The declaration does not allege that the plaintiff was the

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administrator of *Thomas Eagar*, or that the promise was made to him as such. We think the Court erred in admitting the testimony.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. J. Peaslee and *W. W. Wick*, for the appellant.

J. Ryman for the appellee.

MARTIN v. MARTIN.

PRACTICE—After a final decree had been rendered in a cause, the Court ordered (the defendant threatening to appeal, &c.), that the transcript be withheld from the defendant till he should make certain payments, &c. *Held*, that this order was erroneous.

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—This was a petition for a divorce by the wife against the husband. The issue having been made, and the evidence heard, the Court below granted the divorce, and decreed to the petitioner alimony to the amount of \$1,866.66, founded upon an estimate of the personal property of the defendant. It was also decreed, that, until the further order of the Court, the defendant pay to the petitioner, or to the clerk of the Court for her use, \$150 every six months until the said sum of \$1,866.66 be fully paid. The guardianship of a child was given to the petitioner until the further order of the Court, and the defendant decreed to pay to the petitioner \$10.00 in ten days, and \$6.00 every ninety days, until further order for the care and guardianship of the child, and for its support. Costs were also decreed against the defendant. The Court, not knowing the yearly rental value of the real estate of the defendant, directed a master in chancery to ascertain it, and report to the next term of the Court, to which term the cause was continued. After the making the decree, and the continuance of the cause for the purpose above stated, the defend-

ant filed a bill of exceptions; whereupon the Court passed the following order: "And exceptions having been [*322] *filed as aforesaid, and a threat and preparations being made by said defendant to carry this cause to the Supreme Court. It is ordered, that in the event of a transcript being called for, the clerk shall withhold the same until, in addition to his own fees, there be paid to him for the petitioner's use, to enable her to defend any writ of error or appeal in said Supreme Court, the sum of \$100. It is further ordered, that said defendant pay to the clerk for the use of the said complainant, as for alimony, the further sum of \$30.00, every ninety days, until a final decision of said case in said Supreme Court; but this latter allowance to be wholly inoperative if no appeal or writ of error be taken or sued out."

The evidence is spread upon the record; on examining it, we see no cause to disturb the decree of divorce and alimony, including all the orders of the Court up to the time of filing the bill of exceptions. But the conditional decree rendered subsequently we think can not be sustained. The right of appeal is absolute by the statute, and can not be restrained by the Court, except so far as to see that proper security be given by the appellant. On the right of a party to a writ of error, there is no restriction whatever in a cause originating in the Circuit Court. The conditional decree had a tendency to restrain the right of appeal, or of suing out a writ of error, and is therefore erroneous.

Per Curiam.—The decree as to the divorce, &c., made before the filing of the bill of exceptions, is affirmed; but the subsequent decree is reversed. Cause remanded, &c.

H. Brown, for the appellant.

C. Fletcher, O. Butler and S. Yandes, for the appellee.

 Whitney v. Rightclaim, on the Demise of Southwick and Others.

WHITNEY v. RIGHTCLAIM, on the Demise of SOUTHWICK and Others.

EJECTMENT.—The lessor of the plaintiff claimed the premises in dispute, as a purchaser under an execution on a judgment in his favour against one *S.* The defendant claimed the premises as a prior purchaser under an execution, issued before the lessor's, on a judgment rendered against *S.* at the same term with the other, but a few days later. The lessor's [*323] execution *was issued and delivered to the sheriff a short time before the defendant's purchase, of which the latter had notice. *Held*, that the plaintiff was entitled to recover.

ERROR to the *Jefferson* Circuit Court.

SULLIVAN, J.—This was an action of ejectment. The facts were as follows, viz.: At the *September* term, 1839, of the *Jefferson* Circuit Court, two judgments were entered against one *John Stivers*; one in favour of *J. Southwick* and Co.; the other in favour of *Chase* and others. The judgment in favour of *Southwick* and Co., was rendered on the fifth day of the term; the one in favour of *Chase* and others was entered on the ninth day of the term. Both suits were by action of debt, and both docketed for the second day of the term as the statute requires. On the 26th of *March*, 1840, *Chase* and others caused an execution of *fi. fa.* to issue on the judgment in their favour, by virtue of which the sheriff advertised and sold the lot in controversy, and at that sale *Whitney* became the purchaser. On the 22d of *April*, 1840, *Southwick* and Co., the lessors of the plaintiff, issued an execution on the judgment in their favour, which was also levied on the lot sold by virtue of the first execution, and being again exposed to sale by the sheriff, *Southwick* and Co., became the purchasers. It further appears that the sale, at which *Whitney* became the purchaser, was made on the 25th of *April*, three days after the execution in favour of *Southwick* and Co., was issued and delivered to the sheriff; and that *Whitney* had notice that the execution of *Southwick* and Co., was in the sheriff's hands, &c. The cause, by consent of parties, was submitted to the Court, who gave judgment for the plaintiff.

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There is no controversy between the parties except as to one point; and that is, whether a judgment *prior in time* has a *priority of lien* over a subsequent judgment, rendered against the same individual at the same term? For the plaintiff in error, it is contended that the lien given by statute does not apply as between judgment-creditors, or suitors in Court, but only to the case of *purchasers in pais*; for the defendant, it is insisted that the lien does so apply, and that it is absolute in favour of the prior judgment. The point must be settled by reference to our statutes.

[*324] *The 13th section of the act organizing Circuit Courts, &c., R. S. 1838, p. 164, requires the proceedings of each day of the Court to be read and signed, &c.; and provides that no judgment of said Courts shall be of any force, or considered valid, until the same is so read and signed. The 22d section of the act for the prevention of frauds and perjuries, R. S., 1838, p. 316, gives to such judgments the operation of, and declares they shall be, liens upon the real estate of the person or persons against whom they may be rendered, from the day of the rendition thereof, in the county in which they may be rendered, &c.

We are aware that the construction of those statutes, contended for by the defendant, may, if adopted, produce great inequality and injustice amongst suitors, yet, notwithstanding our desire to prevent such a result, we are constrained by the imperative language of the statute to adopt it. The statute makes the judgment a lien upon the real estate of the debtor, from the *day* it is rendered. By the common law, judgments related, generally, to the first day of the term at which they were rendered. The statutes above cited, as well as our practice act, do virtually, if not expressly, abolish that intendment of the common law. The practice act directs the clerks of the Circuit Courts, in making their dockets, to set as many causes for each *day* as in his opinion will be disposed of by the Court, always docketing the actions of debt for the *second* day, &c. Those statutes recognize distinct

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days, and definitely fix the *day* from which a judgment shall be operative.

The *English* statute of frauds, 29 Car., 2, requires judgments to be signed, and provides that, as *against bona fide purchasers*, they shall be judgments only from the time they are so signed, and not relate to the first day of the term. The statute, it has been decided, does not apply as between judgment-creditors and suitors in Court. Its only object was the protection of those who, *bona fide* and for a valuable consideration, purchased the lands of the debtor between the first day of the term, and the day on which the judgment was entered. It seems to have been the object of that statute not to disturb the general intendment of the law, by which judgments are made to relate to the first day of the [*325] *term, except in the particular case specified; but

by our statute, the lien of a judgment is fixed in all cases to commence on the day the judgment becomes valid by being signed, &c., and operates, of necessity, as well between judgment-creditors as others.

We are aware of the hardship to which creditors are sometimes subjected by the operation of the statute, but the remedy must be applied by the Legislature, not by us.

In this case, it appears that the lessors of the plaintiff purchased under the first judgment. The execution on that judgment was in the hands of the sheriff at the time the plaintiff in error purchased under the second judgment. Of that fact he had notice. We therefore think the judgment of the Circuit Court should be affirmed.(1)

Per Curiam.—The judgment is affirmed with costs.

M. G. Bright, for the plaintiff.

S. C. Stevens, for the defendant.

(1) In *April*, 1821, a judgment was rendered against *A* in favor of *B* for \$2,747, and in *March* following another judgment was rendered against *A* in favor of *C* for \$1,241. Execution was immediately issued upon the latter judgment, and *A*'s land sold under it to *D*. Soon afterwards another execution issued upon the first judgment, and the same land was sold under it to *E*. The statute of the State where these proceedings occurred made judgments a lien on the debtor's land for five years. *Held*, by the Supreme

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Court of the *U. States*, that the purchaser under the first judgment was entitled to the land. The C. J. said that it was a principle believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant; and that the single circumstance of not proceeding on it until a subsequent lien had been obtained and carried into execution had never been considered as such an act. *Rankin et al. v. Scott*, 12 Wheat., 177.

But goods and chattels are only bound from the time of the *delivery* of the execution to the sheriff. Note to *McCall v. Trevor*, 4 Blackf., 496; R. S., 1843 p. 743. If two writs of execution against the same person be delivered to the sheriff, he must take the goods on that execution which was first delivered to him, even where both were delivered to him on the same day. Sewell on Sheriffs, 259, 260. In the case of several executions against the same defendant in the hands of different officers, the execution first levied on the goods has the preference. *McCall v. Trevor*, *supra*; R. S., 1843, p. 744.

[*326] *FOWLER and Another v. THROCKMORTON.

USURY.—A suit can not be sustained on a writing obligatory for the payment of money given upon a usurious contract, and governed by the statute of 1838—the illegal interest being included in the amount for which the obligation was executed.(a)

ERROR to the Decatur Circuit Court.

BLACKFORD, J.—*Throckmorton* brought an action of debt against *Fowler* and *Inman*, founded upon a writing obligatory for the payment of \$150. The obligation was dated on the 2d of *March*, 1839, and was payable to the plaintiff on the 8th of *January* then next ensuing. The defendants pleaded the statute of usury. The plea states, among other things, that the sum lent by the plaintiff to the defendants was \$126; and that the residue of the sum for which the obligation was given, was for interest on the loan from the date of the obligation until the time it was payable. General demurrer to the plea. The demurrer was sustained, and final judgment rendered in favour of the plaintiff for the amount of the obligation.

(a) *Ryan v. Vallandigham*, 7 Ind., 416; 7 Blackf., 474.

The only question presented by the cause is whether a suit can be sustained on the obligation before us, given by the defendants to the plaintiff upon a usurious contract, and governed by the statute of 1838, the illegal interest being included in the amount for which the bond was given?

The statute of 1838 against usury, so far as the present case is concerned, is as follows:

“Sect. 2. No person or persons, body politic or corporate, shall, on any contract hereafter made, directly or indirectly, take or receive for the loan, or use, or forbearance of money, or on any contract for the payment of money, above the rate or value of \$6.00 for the loan, use, or forbearance, or on the contract for the payment of \$100 for one year, and so proportionally for any greater or less sum, and for any longer or shorter time, unless the stipulation to pay a higher rate of interest be made in writing, and signed by the party to be charged. But in no case whatever shall any person or persons, body politic or corporate take or receive more than

\$10.00 for any such loan, use or forbearance of [*327] money, or on any such contract for the *payment of \$100 for one year, and so proportionally for any longer or shorter time, or for any greater or less sums.

“Sect. 3. If any person, either directly or indirectly, shall demand or receive any greater rate of interest than may be lawful for the use of any sum of money, the person so offending shall, on conviction by indictment in the proper Circuit Court, pay a fine to the State of *Indiana*, for the use of the county seminary of the county in which the offense shall be committed, double the amount of the excess of interest so received above the amount by law allowed.”

R. S., 1838, p. 337.

This statute expressly prohibits the *taking* of as high an interest on a loan, as that which is included in the contract in question; and we are first to consider whether this contract comes within the prohibition of the statute? We think it does. As the law expressly forbids the taking of as high interest as this contract includes, it will not, of course, per-

mit its recovery when contracted for; and the contract on the subject must therefore be unlawful. It was said by the Supreme Court of the *United States*, in a case which we shall presently cite, and on a question like the one we are now considering, that when the restrictive policy of a law alone is in contemplation, it is a universal rule that it is unlawful to contract to do that which it is unlawful to do.

But the plaintiff contends, that though the contract be prohibited by the statute, still it is not void, because it is not declared to be so in express terms. There is nothing in this argument. A contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute itself does not mention that it shall be so. Comyn on Contracts, 66, and the cases there cited; Chitty on contracts, 694, *et seq.* The charter of the late bank of the *United States* says, that "it (the bank) shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of *six per centum per annum* for or upon its loans or discounts." The contract for a higher rate of interest, &c., is there prohibited, but it is not in terms declared void. In a suit by the bank on a contract, in which the defendant pleaded usury under the above-named clause in the charter, the plaintiff [*328] contended, as is done here, *that the contract was not void, because it was not expressly declared to be so. The Supreme Court of the *United States*, however, thought otherwise. They decided that a contract in violation of that part of the bank-charter was void, on the ground that the contract was prohibited by law. They state the substance of several decisions, both ancient and modern, which are directly in support of their opinion, but which it is not deemed necessary to refer to here. *The Bank of the United States v. Owens et al.*, 2 Peters, 527.

The case just cited is also an answer to the plaintiff's objection to declaring the contract void as to the principal debt, though it be so as to the illegal interest. The statute in forbidding the taking of interest beyond a certain rate on a

loan, prohibits the making a loan on such terms; and the prohibition must apply, if at all, to the whole contract. That is the view which the *United States* Court, in the case we have referred to, takes of the subject. It is there decided, that if the plea of usury made out a case of violation of the provision of the bank-charter fixing the rate of interest, the notes sued on which had been given for the money lent, or the contract therein expressed, were void in law, *so that no recovery could be had thereon*.

It can not be said in this case, that because the statute subjects the person taking illegal interest to an indictment and fine, the validity of the contract is by that means preserved. The party here has not actually received the usurious interest, and is not therefore liable to a criminal prosecution. *Livingston v. The Indianapolis Ins. Co.*, May term, 1842. But if he were so liable, the contract would not be the less objectionable on that account. It has been frequently decided, and we have no doubt correctly, that if an act be forbidden by statute, a contract to do such act is absolutely void, whether the prohibition be under a penalty or not. *Bartlett v. Vinor*, Carth., 252; *Drury v. Defontaine*, 1 Taunt., 131. In a late case, in which the same point is decided, *Bayley, J.*, says: "Where a provision is enacted for public purposes, I think that it makes no difference, whether the thing be prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done, and the objection in this case must prevail, [*329] not for the sake of the defendant, *but for that of the public." *Bensley et al. v. Bignold*, 5 Barn. & Ald., 335; Chitty on Contracts, pp. 692 to 697, and the authorities there cited; *Mitchell v. Smith*, 1 Binn., 110; *Wheeler v. Russell*, 17 Mass., 258.

In looking to what has been the former legislation in this State respecting usurious contracts, we find nothing to change our opinion as to the effect of the act of 1838, to which we have referred. The statutes of 1818 and 1824 prohibited the taking of interest beyond a certain rate, but they quali-

fied the effect of the prohibition relative to the lender's recovery of the principal debt, except, &c. The statute of 1831 prohibited the taking of a higher rate of interest than six *per cent. per annum* unless the agreement for a higher rate was in writing; and it left out the clause in the previous acts relative to a recovery of the principal debt. By a statute of the last named year, the previous acts on the subject were repealed. R. C., 1831, pp. 290, 334. The statute of 1833 repealed the section of the act of 1831, under which parties could contract in writing for what interest they pleased; but it did not reinstate the clause contained in the acts previous to 1831, (and which acts were in 1831 repealed) relative to a recovery of the principal debt though the contract was usurious. It expressly prohibited the taking of more than six *per cent. per annum* interest, unless there was a written agreement for a higher rate, which could not, however, exceed ten *per cent. per annum*; and it made the receiving of a higher rate of interest than that last named, an indictable offense. Stat., 1833, p. 43.

These are the several statutes of the State Legislature on the subject of usury, passed previously to the act of 1838. We think that if any inference respecting the meaning of the act of 1838 on the question before us, is to be drawn from the former course of legislation on the subject, it is against the view of that act taken by the plaintiff's counsel. We certainly see nothing in that legislation which shows that the *direct and unqualified prohibition of usury contained in the act of 1838*, (the act which alone governs the present case) does not render the usurious contract under consideration unlawful and consequently void.

[*330] *DEWEY, J.—In dissenting from the opinion expressed by a majority of the Court in this cause, I do not controvert the correctness of the general doctrine therein stated, that a contract, made in violation of law, is null and void. But I do not assent to the proposition, that there is nothing in the history of our legislation on the subject of usury to prevent the unqualified application of that doctrine to agreements stipulating for more than legal interest. I contend it is fairly inferable from a review of the statutes that the Legislature did not intend by the act of 1838, or any other act, to render such agreements wholly void; but, on the contrary,

that they designed they should be valid as to the principal debt.

Our legislation on this subject can be traced back as far, at least, as 1799. In that year, the Territorial Legislature prohibited the taking of more than six *per cent.* interest on loans, &c.; and enacted that if suit should be brought on a usurious contract, nothing but the principal should be recovered, after deducting whatever might have been paid by way of interest. Laws of 1799, p. 42. It is needless to remark, that the usual consequence of making a prohibited contract was not designed to follow a violation of this statute. The operation of the prohibition was limited to the interest. The law remained unchanged down to 1831, though several revisions had taken place in the mean time. In that year an act was passed forbidding, in the language of the preceding statutes, the taking of more than six *per cent. per annum* for the loan, use, or forbearance of money, &c., "unless the agreement to pay a higher rate of interest be made in writing, and signed by the party to be charged." R. C., 1831, p. 290. This act omits the clause of the prior statutes relative to the collection of the principal in a usurious contract. But it contains no repealing clause. I conceive, therefore, that it left the law as to verbal contracts as it stood before, though it virtually repeals it as to written agreements, which are rendered legal whatever rate of interest they may contain. To effect this change, as I believe, was the sole object of this act; for what possible motive the Legislature could have to render verbal contracts containing usury less valid than they were before, at the same time that they destroyed the very idea of usury as to written con-

[*331] tracts, is beyond my conception. If such *were in fact their intention, they must have designed not to punish usury, but the omission to reduce a usurious contract to writing. Certainly these contracts were not required to be written for the purpose of preventing fraud and perjury. None of the reasons which have induced legislatures to require certain agreements to be evidenced by writing exists in this case. The evil lies in the nature of the contract itself, and

not in the mode of proof by which it shall be established. I do not then give a strained construction to the statute of 1831 in contending that the Legislature did not intend, by omitting the clause of the previous statutes giving efficacy as to the principal in usurious contracts, to render such contracts entirely void thereafter, merely because they were verbal. The supposition implies an absurdity which I am not willing to impute to that body. I can avoid it by viewing these verbal contracts as they were before the passage of that statute—void only as to the interest.

It is true, that some ten days after the passage of the act of 1831, and just at the close of the session, the Legislature inserted in a statute "authorizing the reprinting of sundry acts," &c., the following clause, "All statutes and parts of statutes, and joint resolutions, which have not been passed, or adopted, at the present session of this General Assembly, or which have not by this act been ordered or directed to be reprinted at full length as aforesaid, be, and the same are hereby repealed." R. S., 1831, p. 334. The object of this clause is most obvious. It was designed to prevent confusion and repetition in the code then about to be published, consisting in a great measure of the mere reprint of former statutes. It is true, that its effect was to repeal the clause in the former statutes respecting usury which was omitted in that of 1831. But a repeal under such circumstances ought to have but little, if any, bearing upon the construction of a single statute passed at that session. It has no weight when opposed to the consequences which I have been considering. It leaves the statute in question perfectly open to the construction which I have given it.

It must be admitted that the act of 1833, which reduced the rate of interest on written contracts to ten *per cent.*, and imposed a penalty by indictment on the crime of [*332] usury, did not reinstate the omitted clause. What then? I have shown, I think, that its first omission in 1831 ought not, and did not, have the effect of rendering usurious contracts entirely void; that such was not the design.

of the Legislature. Can its repetition in subsequent statutes have any greater or different effect? But this same statute of 1833 has its omission too. Every act preceding it from 1799 down to its own date, contained a clause fixing the rate of interest on certain debts, where there was no contract for interest; such as judgments, notes, and bonds after maturity, &c. This important clause the act of 1833 omits; and it was not reinstated until 1838. Did any one ever suppose that the Legislature meant by that omission, that such debts should not bear interest? Such an idea was never entertained for a moment. The omission evidently meant nothing. It has always been treated as nothing. I claim the same rule of interpretation for the omission of the act of 1821, and I claim no more. On what principle can it be denied me? To give efficacy to either omission would lead to consequences equally foreign to the intention of the Legislature.

It is admitted by the majority of the Court, that the fine inflicted by the statutes of 1833 and 1838 for the commission of the offense of usury, does not add to the force of the clause prohibiting the reception of unlawful interest in its effect upon the contract. I go further, and contend that the nature of the penalty affords evidence that the Legislature designed to continue the original qualification of that clause. What is the penalty? A fine in twice the amount of the excess of the sum received over legal interest. The effect given to the prohibition by a majority of the Court leads to a singular result. It makes the law punish the intention to commit the offense of usury, with a hundred fold the severity that it does the offense itself! The lender of money, or a forbearing creditor, contracts verbally for six and a fourth *per cent.*, or in writing for ten and a fourth *per cent.* interest *per annum*. The borrower, or indulged debtor, sets up the defense of usury. The whole debt is lost, though it amount to thousands. But the borrower or debtor prefers to pay the thousands which he owes, and the small matter of unlawful interest for which he contracted. The [*333] offense is *then consummated by the creditor; he subjects himself to a penalty perhaps of one dollar! Did

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the Legislature, indeed, intend to produce this state of things? Can they not be saved from this imputation? Nothing is more easy; we have only to understand them as they understood themselves. In 1831, they and their constituents had been accustomed for more than thirty years to consider usurious contracts valid as to the principal, and void only as to the interest. So to view them had become a fixed habit of the public mind. But in that year, in the haste of a Legislative revision of the statutes, and in an act which, surely, had not for its object the suppression of exorbitant interest, but its encouragement, a clause which had so long given character to these contracts is omitted; a general repealing provision, in which the attention of the Legislature was fixed upon no particular act, or the construction of any act, repeals the clause. Legislation on the subject of usury is continued seven years longer, and in a manner which stamps folly and absurdity upon the subsequent acts, if the entire nullity of usurious contracts was intended, but which was sensible and consistent if those contracts were meant to be left as they were when the omission occurred, void only as to the interest. That this latter result was intended I can not doubt. If I am mistaken, our statutes instead of holding up warnings against usury, have been well disguised traps, and have caught many victims who were not aware of their danger. We sometimes look to foreign statutes, and the construction which has been put upon them, as guides to the construction of our own. The statute of *Anne* respecting usurious contracts forbids them, declares them void; and it punishes the crime of usury by a penalty of three times the amount of the principal debt. Here is no inconsistency between the effect of the prohibition, and the penalty incurred by the offense. He who contracts to take usury loses his debt, but he who takes it forfeits thrice as much.

The view I have taken of this subject is not unsupported by authority. A statute of *Rhode Island* forbade the taking of more than six *per cent. per annum* for the loan of money, &c., and inflicted a penalty of one-third of the principal and

all the interest for a violation of the act. The Supreme *Court of the *United States* held, that the effect of the prohibition was not to render a usurious contract wholly void, but that it stood good for the principal, and was annulled only as to the interest. *De Wolf v. Johnson*, 10 Wheat., 367. I do not understand this decision to be overruled by the case of *The Bank of U. S. v. Owens et al.*, 2 Peters, 527. They stand on different ground. The latter rests on an unqualified prohibition to take more than six *per cent.* interest; the former on a prohibition restrained and limited in its effects upon the contract by the nature of the penalty. The Court, looking to that, conceived the design of the Legislature was not to make the whole contract void. It construed one part of the statute by the other. The two decisions were pronounced by the same judge; and I am not aware that they have ever been considered as inconsistent with each other by the Court which made them, or any of its members. I have also strong analogous authority in the decisions of this Court. We have a statute which forbids conveyances for the purpose of defrauding creditors and others, declares such conveyances null and void, and inflicts a penalty upon the parties to them. Here is no qualified prohibition, no clause restraining the nullity of the conveyances to those designed to be defrauded, no proviso guarding the rights of *bona fide* purchasers without notice of the fraud. Yet this statute has, by the repeated construction of this Court, been held to mean that fraudulent conveyances are not void between the original parties, nor as against purchasers for a valuable consideration without notice. It has been placed upon the footing of the statute of 13 Eliz. ch. 5, though that statute expressly declares that fraudulent conveyances shall be void only as to creditors, and contains a proviso saving the rights of *bona fide* purchasers. Our statute drops both these qualifying provisions. Yet the law has been held to remain unchanged. And why? Because, as I conceive, the consequences of the change would be such as to raise a presumption, that the Legislature did not mean to make the change. This is the ground I take in regard to

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the subject under discussion. I approve of the decisions to which I have referred; and I can not but think that consistency requires me to adopt the same reasoning and views relative to the statute of 1838 on the subject of [*335] usury. *It is in view of the singular and pernicious consequences of a different construction, that I have come to the conclusion that the prohibition in that statute is qualified, and that the Legislature did not design to render usurious contracts invalid as to the principal debt.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. H. Dunn, for the plaintiffs.

J. Ryman, for the defendant.

WEST v. NOAKES, in Error.

HELD, that it is error in the Circuit Court to reinstate an action which had been dismissed at a previous term; no cause being shown for reinstating it.

BARR v. DOE, on the Demise of BINFORD.

LEASE A CHATTEL.—A term for years in real estate may be sold on an execution from a justice's Court.

APPEAL from the *Montgomery* Circuit Court.

SULLIVAN, J.—The plaintiff brought an action of ejectment to recover the possession of five acres of land, to which his lessor claimed title by virtue of a purchase at a constable's sale. The facts were that the defendant was the owner of a lease of said premises for the term of three years, created by parol; that a judgment had been rendered against him by a

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justice of the peace; that an execution had been issued on the judgment, by virtue of which *the term* had been levied on and sold; and that *Binford*, the plaintiff's lessor, became the purchaser. The Cause was tried by the Court, and judgment was given for the plaintiff, from which *Barr* has appealed to this Court.

For the appellant, it is contended that a *term of years* can not be sold on an execution issued from a justice's Court.

[*336] *The 46th section of the justice's act, R. S., 1838, p. 373, provides that executions issued by a justice of the peace shall operate as a lien upon the *personal* property of the judgment-debtor, &c.; and the 51st section of the same act further provides that in all cases where execution shall issue, and *goods and chattels* can not be found to discharge the same, in case it shall be made known to the justice who issued it that the debtor has lands or tenements, the justice shall, on application, &c., forward a transcript of his proceedings to the clerk of the Circuit Court, who shall file the same and issue a *scire facias* thereon, &c.

Every species of property comprehended under the general name of chattels is, by the statute, made liable to execution on a judgment rendered by a justice. A term of years is a chattel interest. Upon the death of the tenant, it does not descend to his heir, but goes to his executor. In the division of property into real and personal, it is classed among the latter; and in *England*, upon a *fieri facias* against the goods and chattels of the debtor, it is liable to be seized and sold.

It is contended that the 51st section of the act, by the use of the word "tenements," explains the meaning of the Legislature, and shows that the *movable* chattels only of the debtor were intended to be made liable. We can not adopt this construction. *Tenement* is a word of extensive signification, and in the connection in which it is found in the statute, refers to such interests in real estate as are connected with the freehold, and not included in the term *chattels*.

The Supreme Court of *New York*, in the cases of *Putnam v.*

Woodruff v. Clark.

Westcott, 19 Johns., 73, and *Merry v. Hallet*, 2 Cowen, 497, has decided that terms for years can not be sold on an execution issued from a justice's Court, but those decisions are founded on the peculiar language of the statute of that State, and in accordance with a long course of practice under it. In this State, the practice, so far as our knowledge extends, has been uniformly otherwise.

Per Curiam.—The judgment is affirmed with costs.

H. S. Lane and *S. C. Willson*, for the appellant.

R. C. Gregory, for the appellee.

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*WOODRUFF v. CLARK.

SET-OFF.—Assumpsit on a promissory note and for goods sold and delivered.

Plea, that as to \$166.14, part, &c., the defendant, before the commencement of the suit, &c., paid that sum to the plaintiff in manner following, viz., that the plaintiff was then and there and still is indebted to the defendant in the said sum, for goods, &c., before that time sold and delivered by the defendant to the plaintiff at his request, and for money paid, &c.; concluding with an offer to set-off, &c. *Held*, that the plea was good.

SAME.—The defendant in such suit can not plead as a set-off, nor give in evidence under the general issue, a decree in chancery in his favour against the plaintiff, though for a certain sum of money, if rendered in this State.

ERROR to the *LaGrange* Circuit Court.

SULLIVAN, J.—Assumpsit by *Clark* against *Woodruff*. The declaration contains two counts. The first is on a promissory note; the second is for goods, wares, and merchandise sold and delivered.

The defendant pleaded, 1, Non assumpsit; 2, That as to \$166.14, part, &c., he, the defendant, before the commencement of the suit, &c., paid that sum to the plaintiff in manner following, viz., that said plaintiff was then and there, and still is, indebted to the defendant in the said sum of \$166.14 for goods, wares, and merchandise, before that time sold and delivered by defendant to plaintiff at his request, and for money

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paid, &c.; concluding with an offer to set-off, &c. The third plea was to the first count, and set up an unsatisfied decree in chancery of the *LaGrange* Circuit Court in favour of the defendant against the plaintiff for the sum of \$251, with an offer to set off, &c. 4, Payment. The plaintiff added the *similiter* to the first plea, and demurred to the second. To the third, he filed two replications according to the statute; 1, That defendant did not pay in manner and form, &c.; and, 2, That said decree had been fully paid and satisfied by one *Nicholas*, &c. The Court sustained the demurrer to the second plea; and on a demurrer to the second replication to the third plea, the Court held the plea to be bad. The issues on the first and fourth pleas were tried by a jury. Verdict and judgment for the plaintiff.

We think the demurrer to the second plea ought to [*338] have been overruled. That plea is pleaded as a bar to a part only of the sum demanded, and alleges payment of that part, and according to the requirements of the statute on which it is founded, sets out a contract by which it appears that the plaintiff was indebted to the defendant in the amount alleged to be paid. The demurrer therefore was not well taken, and the Court erred in sustaining it.

There was no error in sustaining the demurrer to the third plea. A suit at law can not be maintained on the decree of a Court of chancery, 2 Blackf., 31; 8 Wheat., 697, except it be a foreign decree, in which case, by express statutory provision, an action of debt may be maintained. The decree pleaded in this case was not a foreign decree, and therefore does not come within the exception. It is manifest, that if an action at law could not be maintained on the decree, it can not be set up, as a legal defense, in such action.

On the trial, the defendant offered the decree in evidence under the general issue, but the Court rejected it; to which the defendant excepted. It follows from what has been already said, that the Court did not err in refusing the testimony. If the decree could not be pleaded in bar of the action, it could not be given in evidence to defeat it.

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The Court erred in sustaining the demurrer to the second plea, for which reason the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

J. B. Howe, for the defendant.

THE STATE, on the Relation of SUGAR, v. ELTZROTH and Another, in Error.

IN this suit, a declaration similar to that in *Peters et al. v. Land*, 5 Blackf., 12, was held to be valid.

A plea in bar in such case, that there is no such judgment on the justice's docket as that described in the declaration, is good.

[*339] *BURTON and Another v. THE STATE.

RECOGNIZANCE.—In a *scire facias* against *A*, *B*, and *C*, on a recognizance conditioned for *A*'s appearance, &c., the plaintiff can not, on a suggestion that the writ *had not been served on A*, proceed to judgment against *B* and *C* alone.

SAME.—*A*'s name was omitted in the body of said recognizance, but it appeared that he had signed and sealed it with the others, and that it was taken and approved by a judge. *Held*, that, notwithstanding the omission, the recognizance was valid, under the statute, as to all the defendants. *Held*, also, that no suggestion of the omission was necessary in the *scire facias*, as it set out the part of the recognizance objected to *in hæc verba*.

SAME.—If the plaintiff undertake in such *scire facias* to give the recognizance *in hæc verba*, he is bound to set out an exact copy.

ERROR to the *Vigo* Circuit Court.

BLACKFORD, J.—This was a *scire facias* against *Jesse Yarnell*, *John Burton*, and *William M. Watkins*, on a joint and

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several recognizance. The writ states that on, &c., before *Jacob Jones*, an associate judge of *Vigo* county, &c., the defendants entered into a recognizance, which was afterwards filed in the clerk's office and recorded, &c. The recognizance, which the writ professes to set out *in hæc verba*, commences as follows: "State of *Indiana*, *Vigo* county, ss. Be it remembered that on the seventh day of *April*, in the year one thousand eight hundred and forty-one, *John Burton* and *William Watkins*, of *Vigo* county, personally appeared," &c. The recognizance is conditioned for *Yarnell's* appearance in the Circuit Court, &c., to answer the State on a charge of burglary, &c., and is executed as follows: "*Jesse Yarnell*, [SEAL], *John Burton*, [SEAL], *Wm. M. Watkins*, [SEAL.] Taken and approved by me this 7th of *April*, 1841. *Jacob Jones*, associate judge." The writ further states that on the first day of the term, &c., *Yarnell* was called and made default; that the other recognizers, his sureties, were called to produce the body of *Yarnell*, and also made default; that the recognizance was therefore declared forfeited, and a *scire facias* thereon ordered to issue; and it commands the sheriff to summon the defendants to appear, &c.

The prosecuting attorney suggested to the Court, that the *scire facias* had not been served on *Yarnell*. The other defendants craved *oyer* of the recognizance, which was granted. The recognizance, as shown on *oyer*, commenced as follows:

"State of *Indiana*, *Vigo* county, ss. Be it remembered [*340] that *on the seventh day of *April*, in the year of our Lord one thousand eight hundred and forty-one, *John Burton* and *William Watkins*, of *Vigo* county, personally appeared," &c. The residue of the recognizance agreed with that described in the *scire facias*. *Burton* and *Watkins* demurred generally to the *scire facias*, and there was judgment against them.

The judgment is erroneous, on the ground that the suit, which is founded on contract, is against three persons, and the judgment is against two of them only; no good cause being shown by the record for the irregularity. 1 Chitt. Plead., 50,

and the cases there cited. *Morris v. Knight*, 1 Blackf., 106. If the writ had been returned "not found" as to *Yarnell*, and that return had been suggested on the record, the judgment might have been entered as it is. R. S., 1838, p. 446. But no such return and suggestion appear. There is a suggestion that the writ had *not been served on Yarnell*, but that does not show that he was not found.

It is contended that the demurrer should have been sustained, first, because *Yarnell* is not a party to the recognizance; and, secondly, because there is a variance between the recognizance described in the *scire facias*, and that shown on *oyer*. The first ground of demurrer is insufficient. The suit, it is true, could not be sustained unless it appeared that all the defendants had entered into the recognizance; but that we think does appear. Although *Yarnell's* name is omitted in the body of the recognizance, yet as it appears that he signed and sealed it with the others, and that it was taken and approved by the judge, it may be considered under the statute, notwithstanding the omission, as the recognizance of all the defendants. And no suggestion of the omission was necessary in the *scire facias*, as it sets out the part of the recognizance objected to *in hæc verba*. *Ross v. The State*, decided at this term.

The other cause of demurrer must prevail. The recognizance, as set out in the *scire facias*, is dated in the year one thousand eight hundred and forty-one; and that shown on *oyer* is dated in the year of our Lord one thousand eight hundred and forty-one. This is a trivial variance, but the defendants, it seems, may take advantage of it. The plaintiff, instead of describing the recognizance according [*341] to its legal effect, undertook to give it *in hæc verba*; and he was consequently bound to set out an exact copy. *Sheehy v. Mandeville*, 7 Cranch, 208, 217; *Lynch v. Wilson*, 4 Blackf., 288.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Whitcomb, for the plaintiffs.

H. O'Neal, for the State.

 Eldon v. Doe, on the Demise of Wynn and Others.

ELDON v. DOE, on the Demise of WYNN and Others.

ALIEN.—A father and his minor daughter, both aliens, came to the *United States* in 1820. Afterwards, in the same year, the father made a declaration in the proper court, of his intention of becoming a citizen of the *United States*, &c., but did not report his daughter, &c. In the next year he purchased land in this State, and died in 1828 without being naturalized, having devised the land to his said daughter. *Held*, that the testator might have acquired under the statute, by his purchase, a perfect title to the land; but that such title could not pass by the devise to his alien daughter. *Held*, also, that by the law governing this case, neither an alien, nor any person claiming from, through, or under an alien ancestor, could acquire a title to real estate by descent. *Held*, also, that the statute of 1840 for the relief of *John Wynn* and others, conferred no title on the lessors of the plaintiff in this suit to the land in controversy.(a)

EJECTMENT.—The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's.

 APPEAL from the *Franklin Circuit Court*.

SULLIVAN, J.—Ejectment. The facts of this case are as follows: *James Wynn*, a native of *England*, emigrated to the *United States* in the year 1820, and on the 11th of *October*, 1820, in the *Franklin Circuit Court* in this State, declared his intention of becoming a citizen of the *United States*. In the report then made, he did not make registry of his wife and children. In the month of *February*, 1821, he purchased the premises named in the declaration, and died on the 23d of *August*, 1828, without taking the oath of allegiance. By his last will and testament, he devised to his daughter *Isabella*, born in *England*, and then a member of his family, the land in controversy. After the death of her father, *Isabella* intermarried with *Eldon*, the appellant, by whom she had issue a son, *William Eldon*. On the 26th of *September*, 1830, [*342] she *died, and on the 20th of *July*, 1834, her son *William* also died. *Eldon*, the appellant, at the time of the death of his son *William*, was also an alien.

The lessors of the plaintiff are *John Wynn*, *Joseph Wynn*,

 (a) *Doe v. Hubbleston*, 1 Ind., 234.

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James Medd and Isabella Medd, who claim title to the demised premises as the heirs of *Isabella Eldon*. *John Wynn* and *Joseph Wynn*, the brothers of *Isabella Eldon*, were natives of *England*. *John Wynn* became a naturalized citizen of the *United States* on the 29th of *September*, 1830, and *Joseph* on the 13th of *October*, 1836. *James Medd and Isabella Medd*, born in the *United States*, are the children of *Mary Medd*, deceased, who was the sister of *Isabella Eldon*, and an alien.

The appellant and his wife *Isabella* were, at the time of her death, in possession of the demised premises.

It also appears that on the 24th of *February*, 1840, the General Assembly passed a special act for the relief of *John Wynn* and others, which was a part of the evidence in the cause, and is as follows, viz.: "Be it enacted, &c., That the lands, tenements, and hereditaments, of which *Isabella Eldon* died seised, &c., shall descend to and vest in such of her heirs as were, by the laws of this State, capable of acquiring real estate by descent at the time of her death, in the same manner as though the said *Isabella Eldon* had been a citizen of the *United States*." The Legislature subsequently passed an act for the relief of *Eldon*, the appellant; but as the examination of that act is not necessary in settling the questions that arise in this case, we will not further notice it.

The Circuit Court, by consent of parties, tried the cause and gave judgment for the plaintiff; from which judgment *Eldon* has appealed to this Court.

The privilege of an alien to acquire a perfect title to lands by purchase is, under certain restrictions, conferred by statute. Rev. Stat., 1838, p. 67. By virtue of that statute, *James Wynn* acquired title to the lands in controversy. If at the time he made his declaration, he had also made report and registry of his wife and minor children, they, notwithstanding his death before naturalization, would have been entitled to all the rights and privileges of citizens, upon taking the [*343] oaths *prescribed by law. Act of Congress, *March* 26, 1804. This was not done, and *Isabella Eldon* was left subject to all the disabilities of an alien. She was not in a

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condition to acquire a good title to real estate by purchase, nor could she take by descent. Under this disability she died, leaving an only child, who has also deceased since the death of his mother.

The lessors of the plaintiff also laboured under the same disability at the time of her death. *John* and *Joseph Wynn*, her brothers, being aliens could not take by descent. *James* and *Isabella Medd*, though born in the *United States*, were incapable of inheriting, because they deduce their title through their mother, and from their aunt *Isabella Eldon*, neither of whom had inheritable blood.

The rule of the common law, that an alien can not acquire a title to real property by descent, was in force in this State when this suit was commenced. And here we remark, that previously to the act of *January 25th*, 1842, we had no statute which, like the statute of 11 & 12 Will., 3, ch. 6, removed the disability from natural born subjects of claiming by descent from, through, or under an alien ancestor. If that statute could be made to apply to this case, the claim set up by *James* and *Isabella Medd* in this suit would be plausible, if not valid.

If the lessors of the appellee, therefore, have any good claim to the demised premises, it is by virtue of the act of *February* the 24th, 1840, above cited. A brief examination of that statute will show, that they can derive no benefit from it. The statutes provide, that the lands, &c., of which *Isabella Eldon* died seised, shall descend to and vest in such of her heirs as were, by the laws of this State, *capable of acquiring real estate by descent at the time of her death*, in the same manner as if she had been a citizen of the *United States*. Who were those heirs? Certainly not the lessors of the plaintiff below. Two of them, *John* and *Joseph Wynn*, were, at the time referred to in the statute, aliens, and being such, were, as we have already shown, incapable of inheriting. The two remaining lessors, *James* and *Isabella Medd*, who claim by representation, were, at the time of the death of *Isabella Eldon*, incapable of acquiring title

by descent from her because the title must come to
[*344] them through their *mother, who was incapable of

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transmitting it. Nor can the statute be construed to apply to *William Eldon*, the son of *Isabella Eldon*, because he was not *in esse* at the date of its passage; and the Legislature could not vest the title, nor did they mean to vest it, in a person not in being. What was meant to be accomplished by the statute we will not undertake to decide. It is worthy of observation, however, that it does not remove the disability of alienage from any of the parties contemplated by it, except *Isabella Eldon* herself. It confers no title on the lessors of the plaintiff below, and it is clear they possess none without it.

We have not looked into the statute for the benefit of *Eldon*, the appellant. In an action of ejectment, the plaintiff must recover on the strength of his own title, not on the weakness of his adversary's.

Per Curiam.—The judgment is reversed at the costs of the lessors, &c. Cause remanded, &c.

G. Holland, for the appellant.

J. Ryman, for the appellee.

THE STATE v. TUELL.

OBSTRUCTING PROCESS—INDICTMENT.—An indictment for obstructing the execution of a search warrant must show the warrant to be legal; and it must therefore show, that the warrant appeared upon its face to be founded on a sufficient affidavit.

ERROR to the *Jackson Circuit Court*.

BLACKFORD, J.—Indictment for obstructing process. The indictment states that, on, &c., at, &c., one *Lawson Wrink* made affidavit before a certain justice of the peace, that a certain heifer had been feloniously stolen, &c.; that he believed the neifer was concealed in or about the premises of one *Benjamin P. Tuell* of said county, &c.; that the justice, on said affidavit, issued his certain warrant under his hand and seal, commonly called a search warrant, to one *James Fislar* then and there being a constable in and for the township of *Grassy Fork* in

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said county, by which warrant the constable was then and there commanded to enter into the premises of the said Benjamin P. Tuell, &c.; that Jesse Tuell, *jun., on, &c., at, &c., unlawfully obstructed the execution of said search warrant, &c.

The Circuit Court, on motion of the defendant, quashed the indictment.

An indictment for obstructing the execution of a search warrant must show the warrant to be legal; and it must therefore show, that the warrant appeared upon its face to be founded on a sufficient affidavit. Such a warrant is not described here, and the indictment is consequently defective.

Per Curiam.—The judgment is affirmed.

H. O'Neal, for the State.

H. P. Thornton, for the defendant.

SHAW and Others v. PARKER, in Error.

TO obtain an order for a partition of real estate when the defendants make default, the applicant must show his title to the Court, and prove that the defendants are owners in common with him of the premises. *Lease et al. v. Carr*, 5 Blackf., 353.

The order for a partition in such case should ascertain and declare the respective proportions of the common owners of the premises, and direct the commissioners to make partition accordingly, and to assign and deliver to each his share. *Ibid.* (17 Ind., 367.)

REED and Others v. GLOVER, on Appeal.

TO authorize the taking of a bill in chancery as confessed for want of an answer, it must appear that the defendant has had notice of the suit. (1 Ind., 152.)

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OBSTRUCTING HIGHWAY—INDICTMENT.—An indictment charged that the defendant was supervisor of the highways in road district No. 1, in the township, &c., county, &c.; that he willfully suffered that part of the road running from S. in said county in the direction of G. in said county, situate in said road district, to be obstructed, &c. *Held*, that the description of the road was sufficient. (a)

SAME.—The *termini* of the road need not be stated in such indictment.

SAME.—The indictment in such case need not aver, that the defendant had the means to keep the road in repair; his not having such means being matter of defense.

ERROR to the Owen Circuit Court.

SULLIVAN, J.—Indictment for neglecting to keep a public highway in repair. The indictment charges that the defendant, at, &c., was the supervisor of the public roads and highways in road district numbered one, in the township of *Washington* and county of *Owen*; that the defendant as such supervisor, then, and during all the time aforesaid, did unlawfully and willfully fail, neglect, and refuse to keep the said road and highways situate, &c., in as good repair as the available labour and other means, &c., would enable him to do, but, on the contrary, willfully suffered, permitted and allowed that part of said road running from *Spencer*, in said county, in the direction of *Gosport*, in said county, then and there during all the time aforesaid situate in said road district, to be obstructed

(a) *State v. Hogg*, 5 Ind. 515.

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&c., so that the same was unsafe, &c. On motion of the defendant, the Court quashed the indictment.

In defense of the judgment of the Circuit Court, it is contended that the indictment is defective, because it does not describe, with sufficient certainty, the road alleged to be out of repair, nor show what particular part of it was obstructed.

We do not think either objection tenable. It is shown that the road out of repair lies within the district of the defendant, and that it is a public road leading from *Spencer* in the direction of *Gosport*. In this respect it is like the indictment in *Rex v. The Inhabitants of Upton*, 6 Carr. & Payne, 133, to which no exceptions was taken on account of the description. The *terminus ad quem* was not given, but the indictment was not faulty on that account. It is not necessary in any case, it is said, to state the *termini* of the road in [*347] *question. 2 Saund., 158, note 6. In the case cited, the indictment was quashed because it did not appear with sufficient certainty that the part of the road out of repair was in the parish that was indicted. That objection does not lie against the indictment in this case. The road, and that part of it said to be obstructed, are, with sufficient precision, shown to be within the district of which the defendant was supervisor.

The remaining objection, that the indictment does not show with certainty that the defendant had the means of keeping the road in repair, &c., can not avail him on a motion to quash. That is a matter of defense to be made at the trial, as was decided by this Court in *Tate v. The State*, 5 Blackf., 73.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal and *J. S. Watts*, for the State.

C. P. Hester and *B. Champer*, for the defendant.

Salmon v. Brown.

SALMON v. BROWN.

PROMISE TO PAY THIRD PARTY—CONSIDERATION.—The indebtedment of *A* to *B* is not, of itself, any consideration for a subsequent promise by the former to *C* to pay to *C* the amount of the debt.

SAME.—*Semble*, that the consideration of a promise sued on must be alleged in the declaration to have moved from the plaintiff.(a)

ERROR to the *Clark* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Brown* against *Salmon*. There are three counts in the declaration. The first is as follows: "*Samuel M. Brown* complains of *John Salmon* in a plea of trespass on the case; for that, whereas, heretofore, to wit, on the eighth day of September, 1830, at *Louisville*, viz., at the county of *Clark* aforesaid, the said *Salmon*, in consideration that one *R. De Hart*, at the special instance and request of the said *Salmon*, had made, executed and delivered to him, the said *Salmon*, a bill of sale, dated the first of September, 1830, of his half interest in the steam mill at *Providence, Indiana*, with its appurtenances, also in cattle, carts, wagons, timber, tools, iron, lots of [*348] *ground and tenements, &c.; promised then and there the said *Brown* to account to him for the same in case of a sale thereof, or otherwise; and although the said *Salmon* then and there received the said goods and chattels, lots and tenements, which were of great value, viz., of the value of \$5,000, and although a reasonable time hath since elapsed in which the said *Salmon* might have made sale of the said property, and accounted for the same to the said *Brown*, according to his said promise and undertaking, and although the said *Brown* heretofore, to wit, on the 20th day of May, 1835, at said county, and before the commencement of this suit, demanded and required of the said *Salmon* to account to him for the property so received as aforesaid by the said *Salmon*; yet,

(a) See *Davis v. Calloway*, 30 Ind., 112; 7 Id., 107; Id., 615.

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the said *Salmon*. not regarding his said promise and undertaking so by him made as aforesaid, but contriving, &c., has not accounted to the said *Brown* for the said property or any part thereof, but has hitherto wholly failed and refused so to do, and still fails and refuses so to do, to the damage," &c.

The other counts are similar to the first.

Pleas, the general issue, and a special plea in bar. General demurrer to the special plea, and the demurrer sustained. Verdict and judgment for the plaintiff.

This judgment must be reversed, on account of the insufficiency of the declaration. The only consideration alleged for the promise to the plaintiff on which the suit is founded, is that about a week previously to the promise, a third person by the name of *De Hart*, had sold certain property to the defendant. That sale, by creating a debt against the purchaser, would be a good consideration for his subsequent promise of payment to *De Hart*, the vendor; but it could not, of itself, be any valid ground for the purchaser's subsequent promise to a stranger of payment to the latter, without the request or consent of the vendor, to whom alone the debt was due. It does not appear that the defendant was under any legal or moral obligation to pay the debt to the plaintiff, or, indeed, that he had any authority to do so. For anything alleged in the declaration, if the debt should be paid to the plaintiff, the defendant would be obliged to pay it again to *De Hart*.

[*349] *If there were any transactions between *De Hart* and *Salmon*, by which the latter became indebted to the plaintiff, the declaration might have alleged that indebtedness as a consideration of the promise sued on; but the mere indebtedness of the defendant to *De Hart* can not, of itself, be a sufficient consideration for the defendant's subsequent promise to the plaintiff as laid in the declaration.

Besides, the law seems now to be settled that the consideration of the promise to the plaintiff must be alleged in the declaration to have moved from him. Chitt. on Cont., 53, and the cases there cited.

DEWEY, J., having been of counsel in the cause, was absent.

The State v. The State Bank.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Lovering and *H. P. Thornton*, for the plaintiff.

R. Crawford, for the defendant.

THE STATE v. THE STATE BANK.

BANK STOCK—TAXATION.—The taxable stock in the branch at *Indianapolis* of the State Bank of *Indiana*, owned and paid in by individuals, is liable for the tax contemplated by the act to provide for the further construction of the *Madison* and *Indianapolis* Railroad, approved *February* the 15th, 1841. (a)

SAME.—In addition to the twelve and a half cents on each share of individual stock in said bank, to be deducted from the dividends for the purposes of education, the stock liable to the *ad valorem* tax is subject to the same ratio of taxation to which other capital is subject; provided the sum deducted from the dividends for education, and the *ad valorem* tax, do not together exceed one *per centum*.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State against the State Bank of *Indiana*. The declaration was filed in the Circuit Court at the *November* term, 1841. The suit was brought in consequence of the non-payment of a certain sum of money alleged to be due to the State from the bank for taxes for the year 1841, on the stock in the branch bank at *Indianapolis*, owned and paid in by [*350] individuals. Plea, *nil debet*, except as to a part of the taxes, &c., and as to that part a tender. Replication admitting the tender, &c.

The parties filed a statement of the facts as agreed upon by them, which raised two questions only, and which questions were submitted to the Circuit Court for decision. These questions are as follows:

“1. Whether the branch at *Indianapolis* of the State Bank of *Indiana* is liable to pay the tax contemplated by the act

(a) See *Craft v. Tuttle*, 27 Ind., 332.

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entitled 'An act to provide for the further construction of the *Madison and Indianapolis Railroad*,' approved *Feb. 15th, 1841*?"

"2. Whether the tax assessed by the 15th section of the bank charter for education purposes is included in or is in addition to the *ad valorem* taxation to which the individual stock is liable as other property, while the whole of the assessment on such stock is less than one *per cent.*?"

The Circuit Court rendered judgment for the defendant.

We think, with respect to the *first* question, that the tax mentioned in it was a State tax; and that the taxable stock in the branch at *Indianapolis* of the State Bank, owned and paid in by individuals, was liable for the *ad valorem* tax contemplated by the statute referred to in the question.

The 15th section of the bank charter, mentioned in the *second* question, is as follows: "Sect. 15. There shall be deducted from the dividends, and retained in bank each year, the sum of twelve and a half cents on each share of stock other than that held by the State; which shall constitute part of the permanent fund to be devoted to purposes of common school education, under the direction of the General Assembly, and shall be suffered to remain in bank and accumulate until such appropriation by the General Assembly; and said tax shall be in lieu of all other taxes and assessments on the stock in said bank. And in case of an *ad valorem* system of taxation being adopted during this charter, the said stock shall be subject to the same ratio of taxation as other capital, not exceeding one *per centum* including the aforesaid tax; and the said tax shall only be assessed on such portion of the stock as shall have been paid, and on account of which the stockholders shall not be indebted to the State."

[*351] *We believe the meaning of that section of the bank charter to be this: That in addition to the twelve and a half cents on each share of the stock other than that held by the State, to be deducted from the dividends for the purposes of education, the stock liable to the *ad valorem* system of taxation, established by law since the date of the

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charter, is subject to the same ratio of taxation to which other capital is subject; provided the sum deducted from the dividends for education as aforesaid, and the *ad valorem* tax, do not together exceed one *per centum*. That is the construction given to the section in question by an act of the Legislature in 1841; and we consider it to be the correct one.(1)

It appears to us, therefore, that both the questions in this cause, submitted to the Circuit Court, were incorrectly decided.

DEWEY, J., dissented from the opinion of the Court on the second question.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. O'Neal, for the State.

C. Fletcher, O. Butler, S. Yandes, and S. C. Stevens, for the defendant.

(1)Vide *The State v. The State Bank*, and *The State Bank v. Brackenridge*. May term, 1845.

HICKLEY v. GROSJEAN and Wife.

PLEADING.—A plea which professes to answer the whole declaration and only answers a part is bad.

SLANDER.—A declaration in slander charged the defendant with speaking of the plaintiff certain actionable words in the *French* language, and gave a translation of the words into *English*. Held, that, by a demurrer to the declaration, the correctness of the translation was admitted.

SAME.—In determining, on such demurrer, whether the words laid are actionable, the Court can only be expected to examine the *English* words.

SAME.—The plaintiff in such case must aver in the declaration, what he understands to be the meaning in *English* of the *French* words charged; and he must prove on the trial, under the general issue, not only the speaking of some of the *French* words laid which are actionable, but he must also prove that the translation of those words is correct.

[*352] *ERROR to the Allen Circuit Court.

BLACKFORD, J.—This was an action of slander brought against husband and wife, for slanderous words spoken by the wife in the *French* language. The declaration

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sets out the words in the language in which they were spoken, and then gives their signification in *English*, and avers that the words spoken were understood by those who heard them. The words laid, according to the translation given of them in the declaration, charge the plaintiff with being a thief; with having stolen a ring, &c. Pleas, the general issue, and two special pleas. The Circuit Court, on demurrer to the special pleas, held the declaration to be insufficient, and gave judgment for the defendants.

The special pleas profess to answer the whole declaration and only answer a part. They are therefore bad on general demurrer.

The declaration is objected to, on the ground that the translation there given of the *French* words, alleged to have been spoken, is not the true one. That objection could not be taken on demurrer, as the translation is admitted, by the demurrer, to be correct. Stark. on Slander, 309.

On the question, whether the words laid are actionable, we can only be expected to understand and examine the *English* words; and they are actionable.

It was necessary for the plaintiff to aver in the declaration what he understood to be the meaning in *English* of the *French* words charged; *Zenobio v. Axtell*, 6 T. R., 162; *Rex v. Goldstein*, 3 Brod. & Bing., 201; *Wormouth et ux. v. Cramer et ux.*, 3 Wend., 394; and he must prove on the trial, under the general issue, not only the speaking of some of the *French* words laid, and which are actionable, but he must also prove that the translation given of the actionable words proved is correct. 4 Phill. Ev., 240. On the trial of an information for a libel in the *French* language, the course pursued was as follows: 1, The publication by the defendant of the libel was proved; 2, An interpreter was called, who swore that he, understood the *French* language, and that the translation was correct. The interpreter then read the whole of that

which was charged to be a libel in the original, and
 [*353] *then the translation was read by the clerk. *R. v. Peltier*, 2 Selw. N. P., 1070, note.

 Atkinson v. Starbuck.

Per Curiam.—The judgment is reversed with costs. Case remanded, &c.

D. H. Colerick and W. H. Coombs, for the plaintiff.

R. Brackenridge, for the defendants.

ATKINSON v. STARBUCK.

DEPOSITION—CAPTION.—A deposition is not objectionable because the name of the State where it is taken is not given in the caption, if the caption allege the deposition to have been taken agreeably to the annexed commission and notice, and the State be named in the *dedimus* and notice attached to the deposition.

SAME—CERTIFICATE.—Nor is the certificate of the justice to such deposition objectionable for omitting the name of the State in which he is justice, if the certificate, by reference to the caption of the deposition, show the name of such State.

APPEAL from the *Washington* Circuit Court.

DEWEY, J.—Assumpsit before a justice of the peace. Appeal to the Circuit Court. Judgment for *Starbuck*, the plaintiff below. The Court suppressed the deposition of *Charles Smith* for want of sufficient authentication. The deposition was taken under a *dedimus* directed “to *Lewis Madison*, Esq., a justice of the peace in and for the county of *Jefferson*, in the State of *Kentucky*.” The notice of the time and place of taking the deposition stated that it would be taken before “*Lewis Madison*, a justice of the peace, at his office on the sixth cross street nearly opposite the jail in the city of *Louisville*, *Jefferson* county, State of *Kentucky*, on,” &c. The *dedimus* and notice were attached to the deposition, and returned with it. The caption of the deposition states, that it was taken “at the office of *Lewis Madison*, a justice of the peace, on, &c., agreeably to the annexed commission and notice.” The certificate at the close of the deposition is, “*Jefferson* county, ss. The foregoing deposition of *Charles Smith* was taken, subscribed, and sworn to by the said *Charles Smith*, before the undersigned, a justice of

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the peace for said county, at the time and place, and for the purpose, stated in the caption thereof.

[*354] *The objections urged against the deposition are, that it does not appear to have been taken in *Kentucky*; and that the justice has not certified that he is a justice of the peace of *Jefferson* county in that State.

We think the objections are unfounded. The caption states that the deposition was taken agreeably to the *dedimus* and notice. As they were annexed to and returned with the deposition, it is proper to refer to them to ascertain the place of taking the deposition. They show (particularly the notice) that *Louisville, Jefferson county, State of Kentucky*, was that place; and the concluding certificate of *Lewis Madison*, referring to what is called the caption, shows that he was a justice of that county and State. The Court erred in suppressing the deposition.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. C. Griffith, for the appellant.

H. P. Thornton, for the appellee.

STEWART v. HAYNES.

PRE-EMPTION—JURISDICTION.—A State Court has no authority to set aside a decision of the register and receiver of a *U. States'* land office, respecting a pre-emption right to public land, for mere error of opinion.

APPEAL from the *Noble* Circuit Court.

DEWEY, J.—This is a bill in chancery, having for its object the enforcement of a pre-emption right to a certain quarter section of land, claimed by the complainant under the laws of the *United States*, and the canceling of a patent procured by the defendant, as is alleged, in fraud of that right. The bill states the facts which the complainant conceived entitled him to enter the land as a pre-emptor; sets out the application

made by him to the register and receiver of the proper land office for the allowance of his claim; alleges that they "erroneously" decided against him, and certified their decision to the general land office, the commissioner of which "erroneously" issued a patent to the defendant for a part of the quarter section in dispute. The bill also sets out the

[*355] *particulars of the fraud charged upon the defendant in making his entry at the land-office. There was a demurrer to the bill for want of equity, which was allowed; and the bill was dismissed.

We think this decision was right. The act of Congress under which the complainant claimed the right of pre-emption, provided that before any entries of land should be made under the privileges of that act, the claimant should make proof of settlement or improvement upon the land he sought to enter, to the satisfaction of the register and receiver in the district in which the land might lie, agreeably to the rules prescribed by the commissioner of the general land-office for that purpose. Land Laws of U. S., part 2, pp. 593, 4. We do not conceive it to be the province of a State Court to reverse the decisions of those officers, at least for mere error of opinion. It seems to have been the intention of Congress, that a person claiming the privilege of pre-emption under the laws of the *United States* should establish his claims, agreeably to certain rules, to the satisfaction of the Federal officers connected with the general system for the administration of the public lands. As the complainant shows that he has failed to do this, he has no case for the cognizance of a Court of equity. Having failed to establish his own right, he can not call in question the title of another.

Per Curiam.—The decree is affirmed with costs.

H. Cooper, for the appellant.

T. Johnson, for the appellee.

Dumont v. McCracken.

DUMONT v. MCCRACKEN.

DEPOSITIONS—DEDIMUS.—The name of a justice of the peace of another State need not be inserted in a *dedimus* to take depositions, in order to render his certificate of the taking of a deposition a valid authentication

SAME—CERTIFICATE.—Nor does such certificate require a seal.

SAME.—A deposition to prove the copy of a bill of exchange, without accounting for the absence of the original, or to prove the institution of a suit, and the rendition and contents of a judgment in *Ohio*, was held to be inadmissible.

SAME.—A *dedimus* in a pending suit to take depositions out of the State must be directed to a justice of the peace; but a person only expecting [*356] to become a *party to a suit, may have a *dedimus* directed to any officer of another State who is there authorized to take depositions.

SAME—AUTHENTICATION BY NOTARY—SEAL.—The authentication of a notary public must be under his official seal.

SAME—CONTENTS OF WRITTEN INSTRUMENT.—The contents of a written instrument can not be proved by a deposition, without accounting for the absence of the original.

ERROR to the *Cass* Circuit Court.

DEWEY, J.—Assumpsit upon the money counts and for interest in arrear. Pleas, the general issue, and four special pleas. To the third plea there was a demurrer, which was correctly sustained. The other pleas led to issues of fact. Verdict and judgment for the plaintiff below.

Before the trial commenced, the defendant moved the Court to suppress the deposition of *Gustavus Swan*, which had been filed by the plaintiff. The motion was overruled, and the deposition read to the jury. It was taken by a justice of the peace pursuant to a *dedimus* directed “to any justice of the peace, or notary public,” &c. The justice certified that he was a justice of the proper county in *Ohio*, where the deposition was taken, and signed the certificate thus, “*Thomas Wood*, justice of the peace in and for said county.”

It is objected that this authentication is not sufficient, first, because the name of the justice is not given in the *dedimus*; and, secondly, because his certificate is without a seal. These objections were correctly overruled. It is not necessary that a

justice, before whom a deposition is taken in another State, should be named in a *dedimus*, in order to render his official certificate of the taking of the same, a valid authentication. *Earl v. Hurd*, 5 Blackf., 248. Nor is a seal necessary for that purpose. The statute only requires the justice to certify officially to the taking of the deposition before him. R. S., 1838, p. 452. We do not know that a seal is an appendage of the office of the justice of the peace in *Ohio*; and can not, therefore, say that the certificate in question, which states *Wood* to be a justice, and is signed by him in that capacity, is not official.

There is, however, a fatal objection to *Swan's* deposition. He swears to the copy of a bill of exchange, the absence of the original not being legally accounted for; also to the institution of a suit, and the rendition and contents of a [*357] judgment *rendered by a Court in *Ohio*. His deposition, at least so far as these matters are concerned, should have been suppressed. The bill of exchange should have been produced in Court, or its absence accounted for, and the suit and judgment should have been proved by an exemplification of the record.

The defendant also moved to suppress three other depositions, taken before a notary public in *Ohio*. The motion was overruled. This was erroneous. The law gives no authority to issue a *dedimus*, in an action already commenced, to any officer out of the State other than a justice of the peace. Rev. Stat., 1838, p. 452. Though a person who expects to become a party to a suit, may procure a *dedimus* directed to any officer authorized by the laws of his own State, to take a deposition. R. S., 1838, p. 272. Besides, the statute requires all authentications made by domestic or foreign notaries public to be under their official seals. R. S., 1838, p. 274. The certificate of the notary in the present instance does not appear to have a seal. The depositions of *Bowland* and *Hunter*, two of the three last named, are also objectionable as containing secondary evidence. They give the contents of written instruments without accounting for the absence of the originals.

Dalton v. The State.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. P. Biddle and *H. Chase*, for the plaintiff.

W. Wright, for the defendant.

DALTON v. THE STATE.

ILLEGITIMATE CHILD—CUSTODY OF.—The mother of an infant illegitimate child is its natural guardian, and has a right to its custody.(a)

SAME.—The mother of such child gave it to A, and afterwards married B.

Held, that the gift did not deprive the mother before her marriage, nor the mother and her husband after the marriage, of the right to the custody of the child during its infancy.

SAME.—The mother can not be deprived of the guardianship of such child by the appointment, by the Probate Court, of another guardian for it, if no notice be given to her of the application for such appointment.

[*358] *ERROR to the *Clay* Circuit Court.

BLACKFORD, J.—*Joseph Griffith* and *Elizabeth* his wife petitioned the Circuit Court for a writ of *habeas corpus* directed to *Dalton*, requiring him to bring before the Court the body of a certain child aged fifteen months, and show the cause of its detention. The petition stated that said *Elizabeth* was the mother of the child, and that, since its birth, she had married the said *Joseph Griffith*.

A writ of *habeas corpus* was accordingly issued.

The defendant made the following return to the writ: 1, That the said *Elizabeth* being unmarried, and alleging the defendant to be the father of the child, gave it to him to keep, &c.; 2, That the Probate Court, the child being illegitimate, and its mother the said *Elizabeth* being unmarried, appointed the defendant guardian of the child, &c.

Plea to the first cause of detention, that the said *Elizabeth* was the mother of the child; that since its birth she had married *Griffith*; and that she had never abandoned the child, &c.

(a) *State v. Banks*, 25 Iv 1., 495.

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Plea to the second cause of detention, that the said *Elizabeth*, the mother of the child, had no notice of the application for the appointment of the defendant as guardian of the child, &c.

There are several other pleas which it is not necessary to notice.

Demurrers to the pleas; demurrers overruled, and judgment for a return of the child to the mother, &c.

The first part of the return to the writ is insufficient. The mother of an infant illegitimate child is its natural guardian, and has a right to its custody. *Ex parte Ann Knee*, 1 New R., 148; *Wright v. Wright*, 2 Mass., 109; *The People v. Landt*, 2 Johns. R., 375. The gift of the child to the defendant by its mother and natural guardian, as mentioned in the return, did not deprive her before her marriage with *Griffith*, nor did it deprive her and her husband after their marriage, of the right to the custody of the child during its infancy. The plea to the second cause of detention is valid. The mother, being the natural guardian of the child, could not be deprived of that guardianship by the appointment of another guardian, of the application for which appointment she had no notice.

[*359] **Per Curiam*.—The judgment is affirmed, with costs.

C. P. Hester, for the plaintiff.

S. B. Gookins, for the State.

POWELL and Others v. KINNEY and Another.

PLEADING.—The declaration in this case contained two counts. The first stated that the defendant informed the plaintiff that he owned a certain steamboat running on the *Mississippi* river, and falsely and deceitfully represented that the boat was new and in good repair; that the plaintiff, confiding in said representations, purchased the boat (it not being present) for a certain sum, paid a part, &c.; that the defendant promised to deliver the boat in good repair to the plaintiff at, &c., as soon as possible, the property of the boat to remain in the defendant until delivery as aforesaid; that the plaintiff had been always ready to receive the boat, &c., but that the defendant, disregarding his promises, thereby deceived and defrauded the plaintiff, as the boat was not in good repair, and fraudulently refused to deliver the

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boat in the condition he promised, though often requested, &c. The second count was in assumpsit for money had and received. *Held*, that the first count was in assumpsit, and that there was therefore no misjoinder.

ARREST OF JUDGMENT.—An arrest of judgment is a final disposition of the cause, to which a writ of error lies.

SAME—PRACTICE.—At the next term after judgment was arrested, a judgment was rendered against the plaintiff for costs. *Held*, that the latter judgment was no part of the record of the cause in which the arrest of judgment was entered.

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—The declaration commenced as follows: The plaintiffs complain of the defendants in a plea of trespass on the case. There are two counts, the first of which is to the following effect: For that whereas, heretofore, &c., the defendants represented to the plaintiffs that they were the owners of a certain steamboat called the *Robert Fulton*, which was running on the *Mississippi* river, and falsely and deceitfully represented that said boat was new and in good repair, &c.; that the plaintiffs then and there, at the special request of the defendants, bargained with the defendants to buy of them said boat, &c., for the price of \$20,000, payable as follows, viz., \$1,200 in hand, \$3,800 on, &c., and the residue on, &c.; that the defendants still representing the boat to be as above stated, sold the same to the plaintiffs for \$20,000, payable as above; that the plaintiffs then and there confiding in said representations of the defendants (the boat not being present), purchased the boat for \$20,000, paid to the defendants \$1,200, and promised to pay the residue as above stated; that the defendants promised and bound themselves to deliver the boat in good repair, &c., to the plaintiffs, or their agent, at the mouth of the *Ohio* river, &c., as soon as it could possibly be done, the property of the boat to remain in the defendants until it should be delivered as aforesaid to the plaintiffs; that the plaintiffs have been always ready and willing to receive the boat agreeably to their said contract; and that a sufficient time has elapsed for the defendants to deliver the boat, &c.; yet the defendants, disregarding their prom-

ises and undertakings, thereby craftily deceived and defrauded the plaintiffs in the premises, in this, viz., the boat was not, when the delivery should have been made, in good repair, &c.; that therefore the defendants have falsely and fraudulently deceived the plaintiffs, and have not kept their promise and undertaking, but have fraudulently and falsely neglected and refused to deliver the boat in the condition and repair they promised and bound themselves to do, though often requested to do so; whereby the boat, &c., could not be and was not received by the plaintiffs; by reason whereof they have been greatly damaged, &c.

The second count is a general one in assumpsit in the usual form, for money had and received.

The defendants pleaded non-assumpsit. Verdict for the plaintiffs. Motion in arrest of judgment, and the motion sustained.

If the first count were founded on tort, there would be a misjoinder of counts, and the arrest of judgment would be correct; but we do not consider the first count to be so founded. We understand it to be a count in assumpsit for the non-delivery of a steamboat, &c., which the plaintiffs had purchased of the defendants, and which the latter had promised to deliver to the former. The Court erred in arresting the judgment.

The arresting of the judgment was a final disposition of the cause, to which a writ of error lies.

It appears that at the next term after the judgment was arrested, a judgment against the plaintiffs for costs was rendered on their motion, but the cause having been finally disposed of at a prior term, the latter judgment is no part of the record before us.

Per Curiam.—The arrest of judgment is reversed with costs. Cause remanded, &c.

S. C. Stevens, for the plaintiffs.

M. G. Bright, for the defendants.

END OF NOVEMBER TERM, 1842.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1843, IN THE TWENTY-SEVENTH YEAR OF THE STATE.

SUTTON and Another v. FLETCHER.

USURY.—A contract made usurious by mistake, and not with a corrupt intention, is not within the statute against usury.(a)

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—*Fletcher* brought an action of assumpsit against *Sutton* and *Bell*, and declared in the first count on a promissory note made by them to one *Ferriter*, and by him assigned to the plaintiff. The second count was for goods sold, money paid, laid out, and expended, &c. Plea, the general issue. The facts were as follows, viz.: *Ferriter*, the assignor of the plaintiff, on the 9th of *December*, 1840, loaned to *Sutton*, at the solicitation of the latter two \$50.00 *Indiana* treasury notes. The agreement was, that the borrower should pay ten *per cent. per annum* on the sum loaned. One *O'Brien*, who was present when the loan was made, was requested to draw a note according to their agreement to be

(a) *Block v. The State*, 14 Ind., 425.

signed by *Sutton*, and *Bell* as his surety. He drew [*363] a note for *\$104 with interest at the rate of six *per cent. per annum*, saying that it was the same as if drawn for \$100 at ten *per cent.* The note was accordingly executed by *Sutton* and *Bell*, and is the same that is set forth in the first count of the plaintiff's declaration.

The testimony with regard to the value of the treasury notes was conflicting. There was proof that at the time the loan was made, such notes were selling at a discount of ten and fifteen *per cent.*; there was proof also that they had often passed at par in the payment of debts and "ordinary business transactions," and that they were often loaned at six and ten *per cent.* interest.

No instruction was asked from the Court. Verdict for the plaintiff; motion for a new trial overruled, and judgment on the verdict, except as to the sum of \$2.30, which was remitted by the plaintiff. The only question was whether the note was tainted with usury.

For the plaintiffs in error, it is contended that this case is similar to the case of *The Bank of the U. S. v. Owens*, 2 Peters, 527, where, on a note discounted by the bank reserving interest at the rate of six *per cent.*, the proceeds of the discount were, by agreement between the parties, received in the depreciated notes of the bank of *Kentucky* at their nominal value, the contract was declared to be usurious. If this case and the case referred to were alike, we should have no doubt of the illegality of the consideration of the note in question. The cases, however, are essentially different. In *The Bank of the U. S. v. Owens*, the facts that there was an agreement between the parties to receive depreciated paper at its nominal value in payment of the proceeds of the discounted note, and that such depreciated paper was actually paid out and received pursuant to the agreement, were admitted by the demurrer to the plea. In this case it is denied that the notes loaned were, at the time of the contract, of less than their nominal value. The testimony was contradictory, and as it has been weighed and

Campbell and Others v. Baldwin, Executor.

decided upon by the proper tribunal, we think we should regard the verdict of the jury as conclusive in the case, that the loan was not made in depreciated paper.

[*364] *It is further insisted, that even admitting the notes loaned to be of the value they purported to be, the note sued on being for \$104 with six *per cent.* interest, exceeded ten *per cent. per annum* on the sum loaned, and was therefore usurious.

It appears from the testimony that the note was not drawn by either of the contracting parties, but by a stranger, and that it was written in the terms in which it is expressed from a mistake of his in calculating the interest. In order to bring a contract within the statute of usury, there must be a corrupt intention in the contracting parties, for if it be made usurious by mistake, that shall not prejudice the parties, for the intent is essential to the usury. *Nevison v. Whitley*, Cro. Car., 501; *Glassford v. Laing*, 1 Camp., 149; 1 Hawk. P. C., 247, sect. 17; 1 B. & P., 151, 154; Comyn on Usury, 16. We think the jury were authorized from the testimony, to find that the note was so written from miscalculation, and not to cover a usurious contract.

Per Curiam.—The judgment is affirmed, with three *per cent.* damages and costs.

W. Quarles, and H. Brown, for the plaintiffs.

C. Fletcher, O. Butler, and S. Yandes, for the defendant.

CAMPBELL and Others v. BALDWIN, Executor.

EXECUTORS AND ADMINISTRATORS.—An omission in a *scire facias* of profert of the plaintiff's authority, when he must sue as executor or administrator, is fatal, on special demurrer; but when he can sustain the action in his own right, such omission is immaterial, though he describe himself as executor or administrator. (a)

SAME.—An executor can sue in his own right on a judgment obtained by him as executor for a debt due to his testator.

SCIRE FACIAS.—A *scire facias* on a justice's transcript need not show the date of the execution which had issued on the justice's judgment, nor of its return of "no property found."

Campbell and Others v. Baldwin, Executor.

CONFESSION OF JUDGMENT.—A judgment confessed before a justice of the peace without the oath prescribed by statute, is good against the party confessing it. And if such party being a *feme sole* afterwards marry, the judgment is also good against her husband.

HUSBAND AND WIFE.—A husband is a proper party to a *scire facias* on a justice's transcript of a judgment rendered against his wife whilst sole.

[*365] *ERROR to the Parke Circuit Court.

DEWEY, J.—*Scire facias* on a justice's transcript for execution against real estate. The *scire facias* describes the plaintiff below, *Baldwin*, as the executor of *Duncan Darrah*, deceased, and shows that he, in his capacity of executor, sued *George Campbell* and *Margaret Cammack* in debt before one justice *Wedding*; that process was duly served upon them; that *Cammack* appeared, and having denied on oath the execution of the note on which the action was founded, judgment was rendered in her favour; that *Campbell* not appearing judgment went against him; that afterwards *Baldwin* procured the judgment to be opened, upon which the cause was continued to a future day for another trial; that the parties appeared accordingly, and *Cammack* directed judgment to be entered against her jointly with *Campbell*, which was done; that justice *Wedding* issued an execution, on which the sum of \$15.00 was made; that *Wedding's* docket passed into the hands of justice *Cloyd*, his successor in office; that an execution issued upon the judgment, which was returned "no property found;" that a transcript of the above proceedings, duly certified by *Cloyd*, as the successor of *Wedding*, was filed and recorded in the office of the clerk of the Circuit Court; and that *Cammack* intermarried with *Asa Mounts* after the rendition of the judgment. The *scire facias* is against *Campbell*, and *Mounts* and his wife, and seeks execution of the balance of the judgment.

The defendants demurred, and assigned, among others, the following causes of demurrer: No profert of the plaintiff's letters testamentary was made. The time, at which the

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execution having the return of "no property found" issued, is not stated. The judgment as to *Cammack* is a nullity, because it was rendered by confession without the necessary oath.

The Circuit Court overruled the demurrer, and rendered final judgment against the defendants.

When it was necessary for a plaintiff to sue as executor or administrator, an omission to show his authority is fatal on special demurrer; but when he can sustain the action in his own right, the omission is immaterial, though he describe himself as executor or administrator. An executor, [*366] having obtained a judgment for a debt due to his testator, can maintain suit upon it in his own right. *Crawford v. Whittal*, 1 Doug., 4, n. 1; *Large et al. v. Atwood et al.*, 1 D. & R., 551; *Talmage v. Chapel*, 16 Mass. R., 71. It was not necessary, therefore, in the cause before us for *Baldwin* to make profert of his letters testamentary.

The statute which authorizes a *scire facias* on a justice's transcript does not require the date of the execution, or of its return of "no goods found," to be certified. The issuing of the execution and its return, only are necessary. These facts appear in this record.

Admitting the judgment against *Cammack*, described in the *scire facias*, to be within the statute requiring an oath on the confession of a judgment before a justice of the peace, she could not, while sole, object to its validity for want of the oath; for the statute expressly enacts that the judgment shall stand good against the party confessing, his heirs, &c., though the oath be omitted. R. 8., 1838, p. 365. And is not competent for her husband to urge an objection, which she, before her marriage, could not have maintained.

It is also contended that the judgment as against *Campbell* is void, because it was rendered in his absence, and without his having had notice of the suit. This objection is not sustained by the facts. Process was served upon *Campbell*. It is true, he did not appear at the first trial, and judgment was rendered against him by default; but the record in-

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forms us that the *parties* appeared at the second trial. He is included in that term, and it must be presumed the judgment was correctly rendered against him.

It is also insisted that *Mounts* was improperly made a party to the *scire facias*, because he was not a party to the judgment rendered by the justice. The filing and recording the transcript did not, indeed, bind his real property; but having intermarried with one of the judgment-defendants, it was necessary to make him a party to any proceedings against her. The plaintiff was unquestionably entitled to prosecute a *scire facias* against her while she remained sole. If he could not, after her marriage, join her husband, he would lose his remedy. *Mounts* was correctly made a party; and the joint judgment is valid.

[*367] *Many other objections were urged against the validity of the judgment of the Circuit Court, but they are clearly without foundation, and need not be further noticed.

Per Curiam.—The judgment is affirmed, with costs.

J. A. Wright, for the plaintiffs.

T. A. Howard, for the defendant.

CHANDLER and Wife v. DAVIDSON.

LIABILITY OF WIDOW FOR DECEASED HUSBAND'S DEBTS.—The circumstance that a widow has possession of some goods of her deceased husband's estate, is not sufficient of itself to render her personally liable to a suit at law for a debt due from the estate, whether she hold the goods under a will of the deceased, or as executrix *de son tort*.

SAME.—Nor is her *parol* promise in such case to pay the debt obligatory on her personally.

STATUTE OF FRAUDS.—A promise to pay the debt of another must be in writing by the statute of frauds, to be the foundation of a suit, unless the consideration be sufficient to give to the promise the character of an original undertaking.

JURISDICTION.—A suit before a justice of the peace can not be sustained, if the amount claimed exceed \$100.

Chandler and Wife v. Davidson.

APPEAL from the *Vigo* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Davidson* against *Chandler* and wife before a justice of the peace. The ground of the suit was a *parol* promise which the wife, before her marriage with *Chandler*, and whilst she was a widow, made to the plaintiff to pay him a certain debt due him from her deceased husband. Plea, *nil debet*. The justice gave judgment for the plaintiff, and the defendant appealed. The cause was submitted to the Circuit Court, and judgment rendered for the plaintiff.

The material facts, as they appear from the record, are as follows: The first husband of Mrs. *Chandler* resided with her in *North Carolina*, and died there indebted to the plaintiff in the sum of \$40.00. He bequeathed his property to his wife after his debts should be paid. The executors named in the will refused to act, and an administrator with the will annexed was appointed. The administrator sold the personal property, the sale amounting to \$500. It does not appear that the testator had any real estate at the [*368] time *of his death. The widow removed to this

State, bringing with her a horse and wagon, which, she said, had been bought in part with means derived from the estate; she also brought with her a clock, worth about \$12.00, which had once been the property of her husband; and she had a few other articles which did not appear to have belonged to the estate. Soon after she came to this State, she *verbally* promised the plaintiff to pay him the debt to which we have referred, which was due to him from her deceased husband; and after such promise, and before the commencement of this suit, she married *Chandler*.

The facts are not sufficient to support the action.

Supposing, as the plaintiff contends, the widow to have had possession of some of the goods of the estate, that circumstance alone would not make her liable to this suit, whether she be considered as holding the goods under the will, or as being an executrix *de son tort*. The assets in her hands, if she had any, might probably be followed by the

plaintiff in chancery ; but his remedy at law, independently of the express promise, would be against her here as an executrix, or against the administrator in *Carolina*.

It is said, however, that considering her as being possessed of the goods under the will, she was under a moral obligation to pay the debts of the estate to the value of the goods, and that such obligation was a sufficient consideration for the express promise sued on. Whether this consideration would have been sufficient, supposing the goods to be held under the will, had the promise been in writing, it is not necessary to decide. The promise was to pay, not the promiser's own debt, but a debt due by her deceased husband ; and such a promise, to be the foundation of a suit, must be in writing by the statute of frauds, unless the consideration be sufficient to give to the promise the character of an original undertaking.

There are, no doubt, cases in which a *verbal* promise to pay the amount of another person's debt, is an original promise, and not within the statute of frauds. There are cases, however, in which a new consideration passes, at the time of the promise, between the newly contracting parties, of such a character that it would support a promise to the [*369] plaintiff for *the payment of the same sum of money, without reference to any debt from another. 2 Stark. Ev., 478. Such are the cases of *Williams v. Leper*, 3 Burr., 1886, and *Castling v. Aubert*, 2 East, 325: But it is evident that the moral obligation relied on in this case, was not a consideration of that description. It was not a consideration that passed between the newly contracting parties, nor was it one that would have sustained a promise to the plaintiff to pay him the same amount, supposing the debt from the estate not to have existed.

The plaintiff further says that the wife may be viewed as an executrix *de son tort*, on the ground of her having wrongfully taken possession of some of the goods, and brought them to this State ; and that her express promise, therefore, would support the suit. But assuming her to have been such

 Smith and Another v. Gibson.

executrix, and that she would have been bound in her own right, in consideration of assets, were the promise in writing, to pay the debt in question, still there can be no doubt, we think, that the *parol* promise was not obligatory on her personally. The having assets was not of itself sufficient to render the promiser liable to a suit in her own right.

There is an objection to the statement of demand filed in this case—the amount claimed by it being over \$100. The objection must be sustained. *Swift v. Woods*, 5 Blackf., 97.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Kinney and *S. B. Goodkins*, for the appellants.

J. P. Usher, for the appellee.

 SMITH and Another v. GIBSON.

PRINCIPAL AND AGENT.—An agent for attending to and managing a grocery and provision store, &c., is not, in consequence of such agency, authorized to draw or indorse notes in the name of his principal.

[*370] *APPEAL from the *Marion* Circuit Court.

SULLIVAN, J.—Assumpsit by *Gibson* against *P. B. L. Smith* and *Adolphus Smith*, the makers, and *Justin Smith*, the indorser, of a promissory note payable to the said *Justin Smith* at the branch bank at *Indianapolis*. The defendants pleaded severally the general issue. The plea of *Justin Smith* was sworn to. The cause was tried by the Court and judgment rendered by the plaintiff.

On the trial, the note described in the declaration was offered in evidence and received without objection. The indorsement was as follows, viz., “Pay *E. T. H. Gibson* or order. *Justin Smith*, by *P. B. L. Smith*, att’y.” The demand of payment at the bank, the protest, and notice to the indorser, were duly proved. The only question at the trial was the authority of *P. B. L. Smith* to indorse the note as the agent of *Justin Smith*. The facts of the case, so far as they relate to the controverted point, were as follows, viz., *Justin Smith*,

who resided at *Edinburgh*, was the owner of a grocery and provision store in the town of *Indianapolis*, which was attended and managed by *P. B. L. Smith*. *Justin Smith* himself was occasionally at and about the store. *P. B. L. Smith* published advertisements signed by himself as the agent of *Justin Smith*, and when depositing money in bank did it in the same character. The former carried on a brokerage business also "in a small way" for the latter, and he was known "to have transacted business in bank for him, such as selling bills on *Cincinnati*, and renewing a note."

It is not pretended that there was any special authority from *Justin Smith* to *P. B. L. Smith* to indorse the note in question. His authority, if he had any, must be inferred from other acts of agency, which, being recognized by *Justin Smith*, would afford evidence of it in this case. From the testimony, it appears that *P. B. L. Smith* was the agent of *Justin Smith* to buy and sell goods in the line of business in which he was engaged. In that capacity, his acts were the acts of his principal. But an authority to buy and sell goods for his principal does not confer a power to bind him by drawing or indorsing notes. In reference to the bills on *Cincinnati* sold by *P. B. L. Smith* for *Justin Smith*, and the note renewed in bank, the plaintiff offered no
 [*371] *evidence to show that in either case the former signed the name of the latter, and that if he did so, the act was adopted or recognized by *Justin Smith*.

There are cases in which an agency may be implied from the prior conduct of the principal, as where one subscribes policies in the name of another, and the latter, upon a loss happening, pays the amount (1 Camp., 43, n. a, 2 Stark. Cas., 368); or where a person has, on former occasions in the principal's absence, accepted bills for him, and the latter, on his return, approved of it (3 Esp. R., 60); or where a confidential clerk had been accustomed to draw checks for the defendants, who in one instance had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their name. *Prescott v. Flinn*, 9

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Bingh., 19. But the rule of law is that no agency will be implied unless there be some evidence of recognition by the principal in the particular case, or in similar instances. *Courteen v. Touse*, 1 Campb., *supra*; *Hooe et al. v. Oxley et al.*, 1 Wash., 19. In this case there is no evidence whatever of such recognition.

It does not appear that the note, which is the foundation of this suit, was ever in the possession of *Justin Smith*, or that he ever knew of its existence. It was drawn by *P. B. L. Smith* and *Adolphus Smith* payable to *Justin Smith*; and one of the makers, professing to be the agent of the payee, indorsed it in his name. No explanation accompanies the transaction; no evidence showing that it was for the benefit of *Justin Smith*, or authorized by him. Under the circumstances, the proof of the agency ought to be clear and conclusive.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

P. Sweetser, for the appellants.

C. Fletcher, *O. Butler*, and *S. Yandes*, for the appellee.

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*CATING v. STEWART.

NOTICE AND MOTION.—In a suit by notice and motion, under the statute, by a surety against his co-surety for contribution, the notice may be served by the plaintiff on the defendant in any county in the State.

SAME.—Such suit may be brought in a justice's Court if the demand do not exceed \$100.

ERROR to the Warren Circuit Court.

SULLIVAN, J.—*Cating*, the plaintiff in this suit, and *George Stewart*, the defendant, were the sureties of one *J. Stewart* on two promissory notes for the sum of \$95.00 each. Judgments were obtained for the amount of the two notes, with interest, &c., and the principal debtor becoming insolvent, *Cating* paid off the judgments, amounting to \$200.

This proceeding was commenced before the justice of the peace, who rendered the judgments above referred to, and is

by notice and motion, under the 8th section of the act "concerning debtors and their securities," (R. S., 1838, p. 233), by which it is enacted that in cases where there are two or more sureties to any note, &c., and one or more of them shall be subjected, by the judgment of any Court to the payment of the debt or damages by default of the principal obligor, and such obligor be insolvent, &c., the Court that rendered such judgment shall, on motion of such surety or sureties, grant judgment that they recover against all and every other co-surety or sureties their respective proportions of such judgment, &c. The 11th section of the act requires ten days' notice of such intended motion to be given in writing to the person against whom the judgment is to operate, if he be a resident of the State; if not a resident of the State, notice shall be given by publication, &c. The justice of the peace gave judgment for the plaintiff. An appeal was taken from the judgment of the justice, and the Circuit Court, on motion of the defendant, dismissed the suit.

The motion to dismiss was accompanied by an affidavit setting forth that the notice was served on the defendant in the county of *Fountain*, and not in the county of *Warren*. The objection to the legality of the service of the notice was not well taken. The only Court that has jurisdiction in [*373] this *summary proceeding, is the Court that rendered the judgment against the surety. The notice, which is preparatory to the motion, must, by the plain direction of the statute, be served on the defendant if he reside within the State. The service is, or may be, made by the plaintiff himself, who is not confined, as an officer would be, to certain territorial limits in the service of process.

It is urged, moreover, in defense of the judgment of the Circuit Court, that as the proceedings in this case were neither by action of debt nor assumpsit, the justice had not jurisdiction to the amount sued for, though it did not exceed \$100. This point was settled in *Steepleton v. McNeely*, (Ante, 76.) The justice having jurisdiction of the subject-matter to the amount sued for, had jurisdiction of the case.

Fisher v. Lacky.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

R. C. Gregory, for the plaintiff.

FISHER v. LACKY.

CONSTITUTIONAL LAW.—The sixth section of the act abolishing imprisonment for debt, approved *January* the 13th 1842, by which all persons then imprisoned on process in civil cases were discharged is constitutional.(a)

APPEAL from the *Montgomery* Circuit Court.

DEWEY, J.—*Fisher* sued *Lacky* in debt on a bond for the payment of sixty dollars. The defendant craved *oyer* of the bond and of its condition. It appeared by the *oyer* that the penalty of the bond is sixty dollars, and that it is conditioned that one *Taylor* should remain a true prisoner within the prison-limits of the jail of *Montgomery* county, until he should be discharged by law. The defendant pleaded covenants performed generally. The plaintiff replied, setting out a judgment against *Taylor*, the issuing of an execution thereon, the imprisonment of *Taylor* by virtue of it, and the execution of the bond declared on for the purpose of affording to him the privilege of the prison-bounds. The breach assigned is that *Taylor* did not remain a true prisoner, [*374] but escaped *beyond the prison-bounds and went at large, without having been discharged by law. The defendant rejoined, that *Taylor* did remain a true prisoner within the prison-bounds, until the passage and publication of an act of the General Asssmbly, entitled “An act to abolish imprisonment for debt,” approved *January* the 13th, 1842; and that after the passage and publication of that act, he went at large, having been by it discharged from imprisonment. The plaintiff demurred generally to the rejoinder. The Court overruled the demurrer and rendered final judgment for the defendant.

(a) See *Scobey v. Gibson*, 17 Ind., 572, and cases there cited.

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The sixth section of the statute named in the rejoinder provides, "that all persons now confined in the prison or prison-bounds, of any county in this State, by or under any writ or other restraining process, in any civil case, be and they are hereby discharged; and this act may be pleaded in bar of any action on any prison-bounds bond." Laws of 1842, p. 68.

It is contended that this statute is a violation of that clause of the constitution, which forbids the passage of any law impairing the obligation of a contract, in regard to contracts made before its enactment, and that the imprisoned debtor could only be discharged in the manner prescribed by the law as it stood at the date of the bond.

This position can not be maintained. Imprisonment of the debtor, as a means of enforcing the payment of a debt, belongs exclusively to the law of the remedy, and may be granted, or withheld at the option of the Legislature, without affecting the obligation of the contract. It is a matter too well settled to admit of controversy, that the Legislature is competent to pass a law, by which an insolvent may be discharged from imprisonment upon a previously contracted debt, without impugning the clause of the constitution alluded to. If the Legislature may destroy the remedy by imprisonment, on account of the insolvency of the debtor, they may do it for any other cause, or simply because it is their pleasure so to do. By the direct operation of the law in question, the debtor was discharged from confinement; his departure from the prison-bounds was no forfeiture of the obligation.

It is also objected to the rejoinder, that it is bad as containing matter of law, because it recites the provision of the *statute above quoted. If it can be considered objectionable on that score, the recital may be considered as surplusage and rejected. The rejoinder is good without it.

Per Curiam.—The judgment is affirmed with costs.

R. C. Gregory, for the appellant.

D. Mace, for the appellee.

Andre v. Johnson.

ANDRE v. JOHNSON.

TRESPASS.—The owner of personal property can not take it from the peaceable through wrongful possession of another by violence on his person.^(a)

PRACTICE.—The party committing the first fault in pleading is not entitled to a repleader, though the verdict against him be on an immaterial issue.

SAME.—A verdict shown by the record to be right, will not be set aside on account of an erroneous instruction to the jury.^(b)

ERROR to the *St. Joseph* Circuit Court.

DEWEY, J —This was an action of trespass by *Johnson* against *Andre*. The first count of the declaration alleges that the defendant assaulted the plaintiff, forced and pushed him with great violence off his horse, threw him down upon the ground, struck him violently, and with great force, insult, and abuse, wrested the horse, saddle, and bridle of the plaintiff from his possession. The second count is for taking and carrying away the horse, saddle, and bridle of the plaintiff.

The defendant pleaded, 1, The general issue. 2, That the supposed trespasses in the first and second counts mentioned were one and the same, and not other or different trespasses; that as to the force, &c., and all the supposed trespasses in the declaration mentioned, except the forcing the plaintiff off his horse, pushing him down upon the ground, wresting the horse, saddle, and bridle from him, and carrying them away, the defendant was not guilty, and put himself upon the country. And as to the residue of the supposed trespasses, *actio non*, because the horse was the property of the defendant; that the plaintiff, with his own saddle and bridle, was “tortiously” mounted upon the horse in a public street; that the defendant requested him to dismount and give up the horse; that he refused; whereupon the [*376] defendant, for the purpose *of obtaining possession of the horse, “gently laid his hands upon the plaintiff” and dismounted him; that defendant took possession

(a) 9 Ind., 397.

(b) 9 Ind., 421; 8 Id., 339.

Andre v. Johnson.

of the horse, and in so doing necessarily forced and pushed the plaintiff down upon the ground; and that he necessarily removed the saddle and bridle to a small and convenient distance, (specifying the place), where he left them for the use of the plaintiff, doing them no needless injury; which were the same, &c.

The plaintiff replied *de injuria*, &c., upon which there was issue. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

It is contended that the Court erred in overruling the motion for a new trial.

It appears by the record, that the plaintiff fully established by the testimony the assault and battery as laid in the first count, except the striking of him by the defendant. Whether the defendant proved the facts set forth in his special plea we have not inquired, because if he did, they constituted no justification of that part of the assault and battery to which they refer. The plea shows no force on the part of the plaintiff in obtaining possession of the horse, nor at what time he obtained it. It simply states, in reference to this matter, that he was tortiously possessed in a public street, and that he refused to give up the horse on the demand of the defendant. It is not lawful for the owner of property to take it from the peaceable though wrongful possession of another, by means of violence upon his person; the remedy lies in a resort to law, not to force. 3 Bl. Comm., 4.

The only matters tendered for issue by the plea—the ownership of the horse by the defendant, his demand of possession, and the plaintiff's refusal to yield it—were immaterial facts. It would have been more regular for the plaintiff to demur, but he is not to lose the benefit of the verdict in consequence of having replied. The first faulty pleading was on the part of the defendant; he can not, therefore, demand a replender, though the issue was immaterial. 1 Chitt. Pl., 694, and the authorities there cited.

The plaintiff set up a claim to the horse under the estray laws; and the Court charged the jury in reference to those

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laws. We do not inquire whether the charge was [*377] correct or *not, for admitting it to have been wrong, we think the verdict was right; and that the damages assessed by the jury, viewed only in reference to the assault and battery proved, can not be said to be excessive.

Per Curiam.—The judgment is affirmed, with five *per cent.* damages and costs.

J. B. Niles, for the plaintiff.

J. L. Jernegan, for the defendant.

JOHNSON v. CRAWFORD.

JUDICIAL SALE—PROMISSORY NOTE.—A note for the payment of money can not, without the defendant's assent, be taken and sold on execution.

SAME.—Whether such sale would be valid, if authorized or assented to by the defendant, *quære*.

ERROR to the *LaPorte* Circuit Court.

BLACKFORD, J.—*Crawford* brought an action of trover against *Johnson*. Plea, not guilty. Verdict for the plaintiff for \$67.00. Motion for a new trial overruled, and judgment on the verdict.

The evidence was as follows: The defendant was a constable, and had a *fiery facias* in his hands, issued by a justice of the peace against the plaintiff for about \$56.00. The plaintiff held a note against one *Claugh* for \$100, which he sent by the defendant to one *Gould*, with a request that *Gould* would enter himself as bail for the stay of execution on the said judgment, and would take the note "to make himself secure that the plaintiff would pay off the judgment when due." *Gould*, accordingly, entered himself bail, and took possession of the note; and the defendant returned the execution. When the time had elapsed for which the execution was stayed, another *fiery facias* was issued against the plaintiff on the judgment, and was delivered to the defendant who called on *Gould* to pay off the execution, stating that he could find no goods and chattels

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of the plaintiff. *Gould* delivered to the defendant the said note against *Claugh*, and directed him to sell it to satisfy the debt. The note was thereupon levied on by the defendant, and sold by him upon the execution; and the proceeds of the sale, being about *\$35.00, were applied to the execution. There was some other property, consisting of whisky, &c., sold under the execution to satisfy the judgment. The plaintiff, afterwards, gave the defendant, as constable, a receipt for \$2.14, for an overplus collected on the execution.

There were some instructions given to the jury, which it is not necessary to examine, as the verdict appears to us to be in accordance with the evidence. The note was not liable to be taken and sold on the execution. *Ingalls v. Lord*, 1 Cowen, 240. It had been sent to *Gould*, not to be given up to be sold on execution, but merely to secure him for any money he should pay as plaintiff's replevin-bail. Nor does it appear that the plaintiff assented to the sale. The receipt is the only evidence on the subject, and that, unaccompanied as it is by any evidence tending to prove the plaintiff's knowledge of the sale when the receipt was given, does not show such assent. Whether if the plaintiff had authorized or assented to the illegal sale, the case would have been different, we have not examined.

Per Curiam.—The judgment is affirmed with costs.

J. H. Bradley, for the plaintiff.

J. L. Jernegan, for the defendant.

THE INDIANAPOLIS INSURANCE COMPANY v. BROWN and Others.

USURY.—A general plea of usury is bad on special demurer.(a)

SAME.—If a note given for a previously existing debt be void for usury, the original debt remains, and may be recovered.

(a) *Moorman v. Barton*, 16 Ind., 39.

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EVIDENCE.—The assignee of a promissory note may, in a suit against the maker for money had and received, give the note in evidence.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by the plaintiffs in error. There are two counts in the declaration. The first count is on a promissory note alleged to have been given by *Brown* to *Jamison*, and indorsed by *Jamison* to *Lister*, by *Lister* to *Seibert* and *Buehler*, by *Seibert* and *Buehler* to *Elder*, and by *Elder* to the plaintiffs. The note was for \$520, dated the 30th of August, 1840, payable [*379] ble *ninety days after date, and negotiable and payable at the branch at *Indianapolis* of the State Bank of *Indiana*. The maker and indorsers of the note are joined in the suit, by virtue of the statute. The second count is for money had and received, money lent, and for money paid, laid out, and expended.

The defendants pleaded to the first count, usury in general terms, and the general issue to both counts.

There was a special demurrer to the plea of usury, because the contract was not particularly set out, and the demurrer was correctly sustained. *Hill v. Montagu*, 2 M. & Selw., 377.

The cause was submitted to the Court on the general issue without a jury. The evidence was as follows: The plaintiffs produced the note and the indorsements thereon as described in the first count, and proved their execution. A witness for the plaintiffs stated, that on the third day after the note became due, he notified all the indorsers in person of the non-payment of the note, and stated also, on cross-examination, that, as agent of the defendants, he delivered the note, indorsed as it is, to the agent of the plaintiffs, and took up another note for the same sum and executed by the same parties, which was then due and under protest; that, at the same time, he executed his own due bill to the said agent of the plaintiffs, or to the plaintiffs, for about \$16.00, which included the costs of protest on the former note; that the due bill, exclusive of costs of protest, was for more than at

the rate of ten *per cent. per annum* interest on the amount of the note ; and that the due bill had not been paid.

The Court gave judgment for the defendants.

The ground relied on by the defendants to sustain this judgment is, that the contract was usurious. This objection, according to the evidence, applies only to the note described in the first count. And supposing that note to be void on account of usury, the plaintiffs may perhaps still be entitled, upon the evidence in the record, to judgment on the second count. The defendants owed the plaintiffs \$520, as appeared by the promissory note mentioned by the witness, to which note no objection appears, and which was due and under

protest. The defendants took up that note, not by [*380] *paying it, but by executing the note described in the first count, and giving a due bill for usurious interest on the last note. It is plain, that if the note last executed is void, as we believe it to be, the original debt for which it was given remains unpaid, and the plaintiffs have a right to recover it. This point is decided by numerous authorities. Comyn on Usury, 190, and the cases there cited.

Considering the first count as out of the question, we are to examine whether the plaintiffs can recover, under the second count, on the note which was given up ; and we think they can. It is true, that it appears from the evidence that the plaintiffs were assignees, and that one of the defendants was the maker, of that note ; but it has been decided, that, under a count for money had and received, a promissory note of which the plaintiff is assignee and the defendant maker, is admissible evidence. *Pierce v. Crafts*, 12 Johns., 90 ; *Olcott v. Rathbone*, 5 Wend., 490 ; *Wild v. Fisher*, 4 Pick., 421. There are no doubt cases to the contrary ; but we are disposed to follow those to which we have referred. We think the evidence respecting the note which was given up—the subsequent note being considered void—shows the plaintiff's right to recover on the count for money had and received.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Seeright v. Fletcher.

P. Sweetser and L. Barbour, for the plaintiffs.*W. Quarles, C. Fletcher, O. Butler, and S. Yandes*, for the defendants.

SEERIGHT v. FLETCHER.

DELIVERY-BOND.—It is no defense to a suit on a delivery-bond, that the officer who took it made a false and fraudulent representation to the defendant respecting the time when the property was to be delivered, and that the bond was not read to or by the defendant.^(a)

SAME—PLEADING—PRACTICE.—If the declaration on a bond with a condition do not send out the condition and assign breaches, and the defendant plead *non est factum* or fraud, the condition and breaches may, before trial, be suggested on the record.

SAME.—In case of such suggestion, the defendant can not plead to the breaches, but he may introduce evidence, on the trial, to controvert them.

[*381] *APPEAL from the *Marion* Circuit Court.

SULLIVAN, J.—Debt by *Fletcher* against *Seeright* and one *Sloan* on a delivery-bond. The declaration contained two counts; one on the bond, the other on the bond setting out the condition. *Sloan*, the principal obligor, was not taken, and the process as to him, was returned “not found.” *Seeright* appeared and craved oyer of the bond and the condition, and pleaded to each count separately: 1, *Non est factum*. 2, Fraud generally. 3, A special plea of fraud, alleging that the constable who made the levy and took the bond for the delivery of the property named in said condition, &c., falsely and fraudulently represented to the defendant that the property was to be delivered to the constable on the fifth day of *April*, 1842, at ten o’clock, A. M., and not on the eighth day of *April*, as stated in said condition; and that said bond was executed in confidence of said false and fraudulent representations without the same being read to him or read by him; and that he was thereby deceived and prevented from delivering said property on the day named in said

(a) *Rogers v. Place*, 29 Ind., 577; 9 Id., 572.

condition, to wit, the *eighth* day of *April*, &c., wherefore, &c. The plaintiff took issue on the plea of *non est factum*; to the plea of fraud pleaded in general terms, he replied denying the fraud; and to the special plea of fraud he filed a general demurrer. The demurrer to the special plea was sustained. Before the trial, the plaintiff asked leave of the Court to suggest breaches, under the first count of his declaration, on the record. The defendant objected, but the Court permitted the plaintiff to do so. The cause was then submitted to a jury. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

The first error assigned is that the Court sustained the demurrer to the defendant's special plea. The demurrer, we think, was correctly sustained. It does not appear that the defendant was deceived by the representations made to him, or if he was, it is manifest that it was the consequence of his own folly. If the defendant were an illiterate man, and the bond had been misread to him, he not being able to detect the imposition, the case would have been different. But it appears that he signed the bond without reading it himself, or hearing it read, and with all the means of know-
[*382] ing the truth *in his power, reposed a blind confidence in representations not calculated to deceive a man of ordinary prudence and circumspection. In such a case, the law affords no relief. 2 Stark. Ev., 374.

The second error relied on is that the Court permitted the plaintiff to suggest, on the record, breaches under the first count of his declaration. It was at one time doubted if a suit were brought on a bond with a condition, without setting out the condition and suggesting breaches in the declaration, and the plea of *non est factum* should be put in, whether the plaintiff could, before trial, suggest breaches on the record. It was thought that the statute of 8 & 9 W., 3, did not apply to such a case. *Gainsford v. Griffith*, 1 Saund. R., 58, note 1. But those doubts have been removed, and it is now settled that it may be done. *Ethersey v. Jackson*, 8 T. R., 255; *Humphrey v. Rigby*, 2 Chitt. R., 298; 2 Saund. R., 187, note 2.

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After the breaches were so suggested, the defendant offered to plead to them, and tendered five pleas, but the Court, on motion of the plaintiff, rejected them. To the opinion of the Court rejecting the pleas the defendant excepted. A defendant can not plead to breaches suggested on the record. He may appear and controvert the evidence of the plaintiff in support of them, but the opportunity for pleading has gone by. *Gainsford v. Griffith, supra*, note 1; *Hodgkinson v. Marsden*, 2 Camp., 121. In *Humphrey v. Rigby, supra*, the action was on a bond without stating the condition. The pleas were *non est factum* and fraud. The plaintiff joined issue, and then proceeded to suggest breaches. After verdict, there was a motion in arrest of judgment, founded on the alleged irregularity of the plaintiff in the suggestion of breaches, and it was argued that, by such a proceeding, the defendant had no opportunity of pleading to the suggestion. The Court said that the defendant never had an opportunity of so pleading in any case where there was a suggestion, and refused the motion.

The appellant also complains of instructions given by the Court to the jury, and of the refusal of the Court to give certain instructions asked. No part of the evidence is spread upon the record, and we do not know whether there *^[383] was any testimony applicable to the instructions refused or not. There is nothing in the instructions given of which the appellant can complain.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

H. Brown, for the appellant.

W. W. Wick and *L. Barbour*, for the appellee.

 HUNTER v. THE STATE, on the Relation of McNEELY.

BASTARDY—NON-RESIDENT DEFENDANT.—If in a case of bastardy before a justice of the peace, the defendant be found guilty in his absence, and the proceedings be certified to the Circuit Court, a warrant should issue

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against the defendant directed to the county in which the Court is held, or in which the defendant may be found, if he reside in the State.

SAME.—If the defendant in such case do not reside in the State, an order of publication may be made on reasonable evidence of his non-residence.

SAME.—An order of publication in such case is not authorized by a return of “not found” to a warrant issued, by the mere direction of the attorney for the State, to a different county from that in which the Court is held.

SAME.—To justify a judgment of the Circuit Court in such case against a defendant who does not appear, there must be a verdict against him.

SAME—FORM OF JUDGMENT.—The judgment in such case against the defendant should be for a specific sum, with directions for its payment, when collected, in such parts and at such times, for the maintenance of the child, as the Court shall think proper, and for costs.

ERROR to the *Warrick* Circuit Court.

DEWEY, J.—This was a prosecution in the name of the State, on the relation of the mother of an illegitimate child, against the putative father. Complaint was duly made before a justice of the peace of *Warrick* county. The justice issued a warrant against the accused person, which was returned “not found.” The justice proceeded, in the absence of the defendant, to take the examination of the complainant, which he reduced to writing and adjudged the defendant guilty. The proceedings were regularly certified to the Circuit Court of *Warrick* county. At the time of filing the justice’s transcript, the counsel for the State directed the clerk to issue a warrant against the accused person to the sheriff of *Gibson* county, returnable to the next term of the Court. This was done, and the writ returned “not

[*384] found.” *An *alias* issued to the same county, with a similar return; whereupon the Court, “it appearing by the return of the writ that the said defendant was not a resident of the State,” ordered publication of the pendency of the suit to be made in a newspaper, which order was complied with. The Court then rendered a judgment, that the defendant was the reputed father of the child, and that the plaintiff recover of the defendant the sum of \$225 for the maintenance of the child; and that the defendant pay the money to the clerk of the Court, to be by him paid to the overseers of the poor of the township where the mother re-

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sided, taking from them a bond with sufficient security, conditioned that they would faithfully pay the same to the person who should be charged with the care of the child; and that the defendant give good security for the performance of the judgment to the acceptance of the clerk. The judgment was also for costs against the defendant.

There are several errors in these proceedings.

When a justice of the peace may have heard and determined a case like the present, in the absence of the accused person, and has certified his proceedings to the Circuit Court, it is the duty of the clerk to issue a warrant against the defendant to the sheriff of the county in which the Court is held, or to the sheriff of the county to which the defendant has fled, (or, as we construe the statute, where he may be found.) R. S., 1838, p. 331.

Had there been any evidence that the defendant resided in *Gibson* county, or had he been taken on the process directed thither, there would have been no necessity of issuing a warrant to the sheriff of *Warrick* county, where the suit was pending. But there was no such evidence. The writ was directed to *Gibson* county upon the mere direction of the counsel for the State; and the defendant was not found there. Under these circumstances, it was necessary that a warrant should issue to the sheriff of *Warrick* county, and be returned "not found," or evidence of the non-residence of the defendant be given, to authorize a further prosecution of the cause.

But it is contended by the counsel for the plaintiff in error, that no order of publication could have been legally [*385] made, *unless it had appeared to the Court, that the accused person had escaped from an actual arrest, or had absconded after the complaint was made. This certainly seems to be the letter of the ninth section of the statute referred to; but to give it a construction so strict would, in many cases, defeat the principal object of the act. That object is to guard the public against the expense arising from the pauperism of illegitimate children. If the putative father should happen to be a non-resident of the State at the time

of committing the offense, or should become so before complaint made, by removal, or even by absconding on purpose to avoid liability, he could not, under the interpretation contended for, be made liable for the support of his child, though he might possess property within the State. We feel authorized to give the statute a more liberal construction; and conceive that, according to its spirit, when process can not be served upon the defendant by reason of his non-residence, notice of the pendency of the suit may be given by publication in the manner pointed out by the statute. There must, however, be reasonable and satisfactory evidence given to the Circuit Court of the non-residence of the accused person, to justify an order of publication. In the present instance there was not such evidence. The return of a warrant by the sheriff of *Gibson* county of "not found," was no evidence that the defendant did not reside in this State. The Court, therefore, erred in ordering the publication.

It was also wrong to enter a judgment against the accused person without a verdict of his guilt by a jury. The statute requires that when the Circuit Court shall proceed in the absence of the defendant, there shall be such "a hearing and determination of the case" as is provided when the accused person has been recognized by the justice, appears in Court, and puts himself on trial. This is by a jury. Sections 6 and 10 of the act,

There is, too, a defect in the form of the judgment. A judgment rendered by the Circuit Court against the defendant, after a trial in his absence, should be for the recovery of a specific sum; with directions that it shall, when collected, be paid for the maintenance of the child in such installments, and at such times, as the Court shall think proper.

[*386] The *provisions of the statute, that an execution is to issue for the whole amount; that the sheriff pay the money, when collected, to the clerk; that the latter pay it to the overseers of the poor of the township in which the mother of the child may reside, taking from them a bond in the manner pointed out by the statute; are all directory

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to the clerk, the sheriff, and the overseers of the poor, and should not be included in the judgment.

Per Curiam.—The judgment is reversed at the costs of the relator. Cause remanded, &c.

J. Pitcher, for the plaintiff.

S. C. Stevens, for the State.

FRAZEE v. JONES.

LANDLORD AND TENANT.—An action of assumpsit was commenced on the 28th of *March*, 1842, against *W. J.* for the use and occupation of land. Plea, that on the 1st of *March*, 1831, one *J. J.* entered into a written agreement with one *D.*, the attorney in fact of the plaintiff, by which *D.*, the attorney, leased the land described in the declaration to *J. J.*, for eleven years from that time; and that in 1837, the defendant took a lease for the land from *J. J.*, and held it under him till the end of his term, and then quitted the possession. *Held*, on general demurrer, that the plea was bad.

ERROR to the *Fayette* Circuit Court.

DEWEY, J.—Assumpsit by *Frazee* against *W. Jones*. The suit was commenced on the 28th of *March*, 1842. The declaration contains two counts, one in *indebitatus assumpsit*, and the other a *quantum meruit*, for the use and occupation of certain land. The pleas were the general issue; the statute of limitations; and two other special pleas. Issues of fact upon the two first pleas. To the two last pleas there were general demurrers. The demurrer to the third plea was correctly sustained; that to the fourth was overruled, and final judgment rendered for the defendant.

The only question presented for our consideration arises from the decision of the Circuit Court on the demurrer to the fourth plea. That plea is substantially as follows: That "on the first day of *March*, 1831, one *Jonathan Jones* entered into a written agreement with one *William Dailey*, the attorney in fact of said plaintiff, by which the said [*387] *Dailey*, the *attorney, did lease to the said *Jonathan Jones*, for the space of eleven years from the 1st day

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of *March, 1831*," a certain tract of land (describing it); that in 1837 the defendant took a lease of the land from *J. Jones*, held it under him until the end of his term, and then quitted the possession. The land thus held under *J. Jones* is averred in the plea to be the same land mentioned in the declaration.

We see no ground on which this plea can be sustained. If it could be considered as containing an averment that the plaintiff, by his attorney, leased the premises to *J. Jones*, under whom the defendant held them during *J. Jones'* term, and also an averment that such holding was the same use and occupation mentioned in the declaration, the plea, as amounting to the general issue, would be good on general demurrer. But the latter averment it certainly does not contain. It simply avers that the land held by the defendant under *J. Jones* was the same land mentioned in the declaration. This may be true, and still the defendant may have occupied the land under *J. Jones* during the existence of the latter's lease; and also under the plaintiff, either before the commencement of that lease on the 1st day of *March, 1831*, or after its expiration on the 1st day of *March, 1842*, and previously to the institution of the suit, which happened twenty-eight days later. In this point of view the plea is evidently no answer to the declaration. The demurrer should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

C. B. Smith and *S. W. Parker*, for the plaintiff.

C. H. Test, for the defendant.

HICKMAN v. REINEKING.

PARTNERSHIP—WITNESS.—*A*, being in partnership with *B*, collected a sum of money in his individual capacity for *C*, and afterwards executed to the latter a note in the name of the firm for the amount. In a suit against the firm on the note, the plaintiff offered to prove that *A*, during the existence of the firm, had declared that said money had been used by him—

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self and partner in the business of the partnership. *Held*, that the evidence was inadmissible.

[*388] *FIRM NOTE FOR PRIVATE DEBT.—If a creditor of one of several partners take a bill or note from his debtor in the name of the firm for his debt, without the knowledge of the other partners, he can not sue the firm on such bill or note.

ERROR to the *Floyd* Circuit Court. ,

SULLIVAN, J.—The plaintiff commenced two actions of debt against *Sisloff* and *Reineking*, before a justice of the peace. The suits were founded on three notes of \$50.00 each, and one of \$46.00. The process was served on *Reineking* and returned not found as to *Sisloff*. The judgments of the justice were appealed to the Circuit Court where the suits were consolidated. The defendant had leave to amend his defense, and, thereupon, as to the three notes of \$50.00 each, pleaded *nil debet*, and swore to his plea. The execution of the note for \$46.00 was not denied. The Court gave judgment against the defendant for the amount of the last named note; from which judgment the plaintiff prosecutes this writ of error.

At the trial, the partnership of *Sisloff* and the defendant was proved. It was also proved, that during the existence of the partnership, *Sisloff* made and signed the notes on which the suits were brought as stated in the record. The defendant then introduced a witness, by whom he proved that the notes were given in consideration of cash to that amount, which had been received by *Sisloff* from certain contractors on the public works who were indebted to *Hickman*, who had authorized *Sisloff* to collect the money for him. The plaintiff thereupon offered to prove that *Sisloff*, during the existence of the partnership, had declared that the money received by him as proved by the defendant's witness, had been applied and used by himself and partner in the partnership business. The defendant objected to the evidence, and the Court sustained the objection. The refusal of the Court to receive the statements of *Sisloff* as evidence, is the error complained of.

The Court decided correctly in rejecting the declarations

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of *Sisloff*, under the circumstances of the case. The money collected by *Sisloff*, on the order of the plaintiff, did not come to his hands as a partner. The order was not drawn in favour of the partnership, but of *Sisloff* in his individual character, and in that character he received the money. It [*389] *was a private transaction between him and the plaintiff. When called on for the money he was unable to pay it. Here his liability to *Hickman* was fixed, and the question is whether his declarations at that time can be received, the effect of which will be to compel another person to share his liability. We think not. We do not question but that it was competent for *Hickman*, by disinterested proof, to show that the money received by *Sisloff* had been used in and about the partnership business, and thereby to have made the partners jointly responsible for the amount. But *Sisloff* himself is manifestly incompetent to establish that fact because, by doing so, he makes his debt to *Hickman* a partnership instead of a private debt.

A private creditor of one of several partners who takes a bill or note on the partnership credit, drawn by his debtor, and without the knowledge of the other partners, commits a fraud on the partnership, and in his hands the bill or note is void. *Green v. Deakin*, 2 Stark., 347; *Wells v. Masterman et al.*, 2 Esp. R., 731; *Arden v. Sharpe et al.*, Ib., 524; *Cary on Part.*, 41, 2.

Per Curiam.—The judgment is affirmed, with costs.

J. W. Payne and *H. P. Thornton*, for the plaintiff.

R. Crawford, for the defendant.

PLATT v. SCOTT.

PRESUMPTION AS TO KNOWLEDGE OF LAW.—It is considered that every person is acquainted with the law, both civil and criminal; and no one can, therefore, complain of the misrepresentations of another respecting it.(a)

(a) 8 Blackf., 144; Id., 277; 6 Id., 128; 7 Ind., 232.

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ERROR to the *Cass* Circuit Court.

BLACKFORD, J.—*Platt* sued *Scott* in debt on two promissory notes executed by the latter to the former on the 11th of *January*, 1840. Pleas: 1, *Nil debet*. 2, That the notes were obtained by fraud. Replication in denial of the second plea. Verdict and judgment for the defendant.

It appears from the evidence, which is spread on the record, that the notes were given in part consideration of a land warrant issued at *Washington* city by the Secretary of [*390] *war, for 320 acres of land, under an act of Congress approved *March* the 5th, 1816, entitled “An act granting bounties in land and extra pay to certain *Canadian* volunteers.” The warrant was issued in 1816 in favour of one *Hall*, and was sold by him to the plaintiff in 1817. The sale of the warrant by the plaintiff to the defendant was made in *January*, 1840, at the time the notes were given. There is some evidence tending to show that the plaintiff represented to the defendant before the purchase, and as an inducement to it, that the warrant could be located on any land belonging to the *United States* within the *Indiana* territory which had been surveyed, with the exception of salt springs, &c. That representation was in conformity with the act of Congress of 1816, under which the warrant issued; but the law had been changed by a subsequent act of Congress, which confined the location of warrants like that in question to lands of the *United States* within this State which had been previously offered for sale. This misrepresentation of the legal effect of the warrant was relied on by the defendant to defeat the suit.

The Court instructed the jury, among other things, “that every person is bound to know the criminal law of the land, but not the civil law.”

That instruction we conceive to be erroneous; and it may have had an influence with the jury injurious to the plaintiff. It is considered that every person is acquainted with the law, both civil and criminal, and no one can, therefore, complain of the misrepresentations of another respecting it. In the case

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before us, the defendant must be presumed to have known the law regulating the location of the warrant in question; and he can not, therefore, be permitted to say that he was misled by the representations which the plaintiff made as to what the law was on the subject. See the remarks of *Bayley*, Justice, in *Lewis v. Jones*, 4 Barn. & Cress., 506.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Lockwood and *H. P. Biddle*, for the plaintiff.

[*391] *L. D. McNEELY and Others, Heirs, v. RUCKER.

RECORD OF DEED—EVIDENCE.—The record of a conveyance, shown to be a true copy, is admissible evidence for the grantee—satisfactory proof having been given of the loss of the original, and its execution duly proved.

PROOF OF LOSS OF PAPERS.—A *subpoena duces tecum* in this cause was served three or four days before the trial on a lessee, requiring him to produce his lease. He was sworn as a witness, and stated that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year, &c. *Held*, that the loss of the lease was not sufficiently proved to authorize the admission of *parol* evidence of its contents.

DELIVERY OF DEED.—A conveyance having been signed, sealed, and acknowledged by a husband and wife in due form, was sent by the former in presence of the latter, to the recorder's office to be recorded. *Held*, in an action of disseisin by the grantee, that the conveyance had been legally delivered. (a)

FEME COVERT BOUND BY HER DEED.—A conveyance executed by a *feme covert* can not be avoided by her after her husband's death, on the ground that she had executed it under a misapprehension of her legal rights.

SAME.—An acknowledgment in the usual form by a *feme covert* of a conveyance before a magistrate, estops her and those claiming under her from saying that she had not freely and absolutely executed the conveyance.

VOLUNTARY CONVEYANCE.—A voluntary conveyance is valid against a subsequent purchaser for valuable consideration *with notice*; and the record of such conveyance is sufficient notice. (b)

(a) *Somers v. Pumphrey*, 24 Ind., 231; 20 Id., 387.

(b) *McCaw v. Burk*, 31 Ind., 56; 19 Id., 271.

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ERROR to the *Shelby* Circuit Court.

BLACKFORD, J.—This was an action of disseisin, brought by *Elzy Rucker* against *James McNeely*. Plea, not guilty. Verdict and judgment for the plaintiff.

The plaintiff claimed title to the premises by virtue of a conveyance from *Claiborne Rucker* and *Nancy* his wife; and the defendant claimed them under a conveyance of the said *Nancy*, executed after the decease of her husband.

On the trial, the plaintiff offered to read, from the record book of the county, a copy of the deed under which he claimed, having first given evidence respecting the loss of the original, and proved the copy to be a true one. The copy was objected to, but was admitted. It has already been decided by this Court, upon evidence similar to that given in the present cause, that the copy in question was admissible evidence; *Rucker v. McNeely*, 5 Blackf., 123; and **we are still** of the same opinion.

The defendant offered to prove, by *parol*, the contents of a lease for the premises, alleged to have been executed by *Claiborne Rucker* to one *Cartmill*, before the date of the [*392] *conveyance to the plaintiff. The evidence was objected to, and the objection sustained. A *subpœna duces tecum* had been served upon *Cartmill* in order that the lease might be produced; and he was sworn as a witness. The *subpœna* had been served only three or four days before the trial; and the witness said that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year; and that since he was subpœnaed, he had been at home two or three times for a night, and searched as aforesaid, &c. We think the loss of the lease was not sufficiently proved to authorize the admission of *parol* testimony of its contents.

The defendant offered *Nancy Rucker*, his grantor, as a witness. It was admitted that she was the widow of said *Claiborne Rucker*; that the premises in dispute were hers in

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fee simple before her marriage; that the conveyance to the plaintiff by her and her husband, purported to be executed by them in consideration of their love and affection for the plaintiff, who was the grandson of said *Claiborne*; that since the death of her husband she had conveyed the premises to the defendant in consideration of \$250 with a covenant of warranty; but that the defendant had, on the day of the trial, released her from the covenant. The defendant proposed to prove by this witness, that she had signed, sealed, and acknowledged the deed to the plaintiff, but had not delivered it; that after it was sent to be recorded as aforesaid, (that is, as the subscribing witness, examined by the plaintiff, had stated, after said *Claiborne* had sent it, in presence of said *Nancy*, to the recorder to be recorded), it never again came into the possession of said *Claiborne*; that this witness had signed, sealed, and acknowledged the deed to the plaintiff under a misapprehension of her legal rights—she being informed and believing that the land, in consequence of her marriage, belonged to her husband in fee simple; and that it was necessary to convey it to the plaintiff, to prevent its being taken for her husband's debts, he being greatly embarrassed; and that she was induced to sign, seal, and acknowledge the conveyance by the [*393] duress and menaces of her *husband, and on condition that it should not be delivered. The witness was objected to as incompetent, and the objection sustained.

According to the evidence proposed to be given by the witness, the deed to the plaintiff had been legally delivered; it having been signed, sealed, and acknowledged by the husband and wife in due form, and sent by the former in presence of the latter to the recorder's office to be recorded.(1) The proposed testimony of the witness, therefore, on the subject of the delivery of the deed, could not have benefited the defendant.

That the witness had executed the deed to the plaintiff under a misapprehension of her legal rights, which the defendant offered to prove by her, is no ground for avoiding the deed. Every person is presumed to know the law. *Platt v. Scott*, decided at this term.

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The evidence, as offered to be given, shows that the witness had executed and acknowledged the deed, and, the contrary not appearing, it must be presumed that the acknowledgment was made, in the absence of her husband before the magistrate in the usual form, viz., that she had voluntarily, and of her own free will and accord, and as her act and deed, sealed and delivered the conveyance, without any coercion or compulsion from her husband. The witness, and all persons claiming under her, are estopped by that acknowledgment which she admits to have been made, from saying that she had not freely and absolutely executed the deed.

We are of opinion, therefore, that the rejection of the witness can not be assigned for error.

As a motion for a new trial was made by the defendant and overruled, it is proper to notice another objection made to the judgment. The conveyance to the plaintiff was a *voluntary* one, which, it is admitted, would be void as to a subsequent purchaser from the grantor, for a valuable consideration, *without notice*. Supposing that doctrine applicable to this case, which is of a subsequent sale and conveyance by the widow, the other grantor being dead, still it can not benefit the defendant, because the first deed having been recorded, he was a purchaser *with notice*. *Stanley v. Brannon et al.*, May term, 1842.

(Ante, p. 193.)

[*394] **Per Curiam*.—The judgment is affirmed with costs.

W. J. Peaslee, for the plaintiffs.

J. Ryman, for the defendant.

(1) A conveyance of real estate executed and recorded without the knowledge of the grantee is valid, if subsequently accepted by him. *Harrison v. The Trust. of Phil. Academy*, 12 Mass., 456. But if before the grantee's consent to the conveyance in such case, a third person obtain a judgment against the grantor, the judgment will have the preference. *Goodsell et al. v. Stinson*, May term, 1845.

 Davis, Administrator, v. Davis.

DAVIS, Administrator, v. DAVIS.

PLEADING.—The statement of demand in a suit by an administrator in a justice's Court, was substantially as follows: The defendant, on, &c., had "swapped" a certain bay horse to A, the intestate, and delivered the horse to him; the defendant afterwards took the horse into his possession without the plaintiff's consent, and converted him to his own use, &c.; to the plaintiff's damage, &c. *Held*, that this was a sufficient statement in trover. *Held*, also, that it was too late, after a plea to the merits, to object to the statement of demand.

SAME.—If the defendant demur and plead to the statement of demand, the plea overrules the demurrer.(a)

ERROR to the *Washington* Circuit Court.

SULLIVAN, J.—The plaintiff, as the administrator of *Jeremiah Brooks*, commenced a suit against the defendant before a justice of the peace, and filed a statement of his cause of action, setting forth in substance that the defendant, on, &c., "swapped" a certain bay horse to said *Brooks*, and then and there delivered the said horse to him; that afterwards, to wit, &c., the defendant took the horse into his possession without the consent of the plaintiff, and converted him to his own use, &c.; to the plaintiff's damage \$50.00. The defendant pleaded seven pleas, six of which were to the merits; the seventh was in the nature of a demurrer, denying the sufficiency of the plaintiff's statement. The cause was tried by a jury in the justice's Court. Verdict and judgment for the plaintiff. On appeal to the Circuit Court, the suit was dismissed for want of a sufficient cause of action.

The plaintiff's statement is very imperfectly and informally drawn. It is, however, like most of those filed in justice's Courts, which being prepared without professional aid, want the accuracy which pleading, in other Courts, is required to *possess. The statute does not require exactness in pleading in justices' Courts, and it is now settled that any statement, however informal it may be,

 (a) *Phelps v. Wiles*, 2 Ind., 325.

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will answer the purpose, provided enough be shown to bar another action for the same demand. 4 Blackf., 13. (Ante, 184.)

From the statement in this case, we understand the action to be for a trover and conversion after the death of the intestate. There is no distinct averment in the statement, of the death of *Brooks*, nor that the conversion took place after his death, but it is averred that it took place while possession was in the administrator. This, according to previous decisions, is sufficient in cases of this kind. The omission, moreover, is aided by the third plea, which defends the action on the ground that the horse named in the statement was delivered to the defendant by "the agent of said estate," in discharge of a contract, &c. 1 Chitt. Pl., 710.

A further objection to the judgment of the Court is, that the defendant had pleaded to the merits before he moved to dismiss. The motion should therefore have been overruled as being made too late. It is said, however, that the objection was made before the justice. It is true that the defendant did, in the justice's Court, plead and demur to the statement, but it is a rule of pleading that a party shall not plead and demur to the same matter, and if he do, he shall make his election, which the defendant did in this case, by trying the cause before the justice on its merits. Steph. Pl., 278.

We think the plaintiff's statement is sufficient to apprise the defendant of the nature of the demand against him, and that enough is shown to bar another action for the same demand.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. P. Thornton, for the plaintiff.

J. W. Payne, for the defendant.

The State, on the Relation of Williams, v. Lynch and Another.

THE STATE, on the Relation of WILLIAMS, v. LYNCH and Another.

CONSTABLE'S BOND.—A constable's bond is not void merely because the penalty was not fixed, as the statute requires, by the board doing county business.^(a)

[*396] *ERROR to the *Putnam* Circuit Court.

SULLIVAN, J.—The plaintiff, for the use of *Williams*, brought an action of debt against one *Grogan* and the defendants, on a constable's bond, before a justice of the peace. Process was served on the defendants, and returned not found as to *Grogan*. Amongst other pleas the defendants pleaded *non est factum*. The Circuit Court, at the trial, decided that the bond was void, and gave judgment against the plaintiff.

It appears from the bill of exceptions, that *Grogan* was duly appointed constable of *Washington* township in *Putnam* county, and that he entered into bond before the clerk of the Court in vacation, who approved of the defendants as sureties. It appears, also, that the county board omitted to fix the penalty in which the bond should be taken.

The statute enacts, that constables shall give bond in the penalty of not less than \$300 nor more than \$2,000, to be determined by the board doing county business, which bond may in vacation be taken by the clerk of the Court, who is authorized to approve of the sufficiency of the security; the board fixing the amount of the bond, &c. R. S., 1838, p. 144.

The only question is, whether a constable's bond taken by the clerk in vacation, regular in every respect except that the penalty was not fixed by the county board, be void or not?

We think the omission of the board to direct the amount of the penalty, does not make the bond invalid. Even if the bond be not a good statutory bond, a point which it is not now necessary to determine, it does not therefore follow that it is of no validity. It was entered into voluntarily and upon a suffi-

(a) See cases cited in *Byers v. The State*, 20 Ind., 47.

Middleton v. Harris.

cient consideration, and is, we think, a binding obligation at common law. *Grogan*, the principle obligor, was duly appointed to office, and was required to give bond with security in an amount to be fixed by the appointing power. Instead of doing so, he and his sureties entered into bond in a sum fixed by themselves, and *Grogan* entered upon the office to which he had been appointed. Numerous cases are reported in which it is held that bonds void as statutory bonds, are, notwithstanding, binding at common law. *Thompson et al.*

v. *Wilson*, 1 Blackf., 358; *Spader v. Frost*, 4 Id., [*397] *190, and the authorities cited. A bond taken in a sum greater or less than the penalty fixed by a statute is not therefore void, but is a good bond at common law. 1 Bibb., 192; 2 Id., 186.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

E. W. McGaughey, for the plaintiff.

J. Cowgill, for the defendants.

MIDDLETON v. HARRIS.

JUSTICE'S JURISDICTION.—Justices of the peace have jurisdiction in replevin when the value of the property sued for does not exceed \$50.00, though the damages claimed for the detention exceed \$20.00.

ERROR to the *Elkhart* Circuit Court.

DEWEY, J.—*Middleton* sued *Harris* in replevin before a justice of the peace. The affidavit on which the writ issued, and which was also filed as the cause of action, stated the value of the property detained to be \$50.00, and laid the damages at the same sum. There was a trial on the merits before the justice, and a judgment for the defendant. The plaintiff appealed. On the calling of the cause in the Circuit Court, the defendant moved to dismiss the suit. The motion prevailed, on the ground that more than \$20.00 being claimed in damages,

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the justice had no jurisdiction of the cause. Judgment against the plaintiff for costs.

The 18th section of the act respecting justices of the peace is relied on to sustain this decision. That section, after defining the general powers of a justice of the peace, provides that nothing contained in it shall be so construed as to give to a justice jurisdiction in any action for the recovery of damages for any trespass, wrong, or injury, done to or committed against the property of a person, nor in any case founded on tort, where the damages demanded shall exceed \$20.00; nor in any action of replevin where the value of the property claimed shall exceed \$50.00. R. S., 1838, p. 364.

[*398] *We think the actions here referred to, in which the jurisdiction of the justice is limited to \$20.00, are actions sounding merely in damages, and that replevin, in which the main object is the recovery of specific property, is not one of them. The jurisdiction of justices, in replevin, depends upon the value of the property claimed, and not upon the amount of damages for the detention. This is plain, not only from the section above quoted, but also from the 39th section of the same act, which expressly invests justices with jurisdiction in replevin when the value of the property to be replevied does not exceed \$50.00, and authorizes them to proceed to judgment and execution as fully as the Circuit Courts may do in actions commenced before them. R. S., 1838, p. 372. Having absolute jurisdiction in such cases, justices are authorized to entertain them, though the incidental damages occasioned by the detention of the property may exceed \$20.00. The suit should not have been dismissed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Fletcher, O. Butler, and S. Yandes, for the plaintiff.

J. L. Jernegan, W. W. Wick, and L. Barbour, for the defendant.

Halbert v. Stinson and Another.

HALBERT v. STINSON and Another.

ATTACHMENT—GARNISHEE.—A garnishee in foreign attachment admitted, in answer to interrogatories, his indebtedness by judgment to the defendant in attachment. The Court without any motion, and against the plaintiff's will, dismissed the proceedings against the garnishee, the attachment being still pending. *Held*, that the dismissal was erroneous.

SAME.—A person indebted by judgment to the defendant in such attachment may be summoned as a garnishee, and be held responsible to the plaintiff in attachment.

ERROR to the *Vanderburgh* Circuit Court.

DEWEY, J.—*Halbert* sued out a writ of foreign attachment against *Halloway*, and caused *John B. Stinson* and *Berry P. Stinson* to be summoned as garnishees. They appeared, and in answer to interrogatories, admitted they were indebted [*399] to **Halloway* on a judgment which he had recovered against them in the *Vanderburgh* Circuit Court, before the service of the summons. The Court, without any motion having been made by any of the parties to that effect, and against the will of *Halbert*, dismissed the proceedings against the garnishees, the suit being still pending against *Halloway*. To reverse that decision, *Halbert* prosecutes this writ of error.

Without inquiring into the regularity of the suit against *Halloway*, we think the Circuit Court was wrong in dismissing the proceedings against the garnishees, pending the attachment against *Halloway*. As to them, the action should have been continued until the determination of the cause against the defendant in attachment. R. S., 1838, pp. 75, 81. That the garnishees owed *Halloway* by judgment was no objection to their liability to his creditor. The law is that in a proceeding by foreign attachment, a person indebted, in any manner, to the absent debtor may be summoned and made responsible as a garnishee. R. S., 1838, p. 81.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. T. T. Jones, for the plaintiff.

YOUNG and Others v. PEERY.

REPLEVIN BAIL, LIABILITY OF.—The taking of a delivery-bond of an execution-debtor, and proceeding on it to judgment and execution without obtaining satisfaction, are no bar to a *scire facias* against the replevin bail in the case.

ERROR to the Marion Circuit Court.

BLACKFORD, J.—This was a *scire facias* issued by a justice of the peace against *Peery*. The writ stated that the plaintiffs had obtained judgment against one *Stuck*, &c.; that *Peery* had become bail for the stay of execution; and that after the expiration of the time, &c., a *feri facias* had issued on the judgment against *Stuck*, and been returned “no property found.” The defendant pleaded, 1, That after the expiration of the time for which the judgment was replevied, an execution was issued by the justice on the judgment against *Stuck*; that the constable levied on certain goods of *Stuck*, and took a [*400] *delivery-bond from him and one *Givan*, his surety; that the goods were not delivered, and the bond was forfeited; and that the goods levied on were sufficient to satisfy the judgment. 2, That after the expiration of the time, &c., *Stuck* had goods enough to satisfy the judgment.

The justice gave judgment for the plaintiffs, and the defendant appealed. The cause was submitted to the Circuit Court without a jury, and a judgment rendered for the defendant.

The facts are as follows: The plaintiffs obtained a judgment before a justice of the peace for a certain sum against *Stuck*, and *Peery* became replevin bail in the case. After the time for which the judgment was replevied had expired, a *feri facias* was issued on the judgment against *Stuck*, and levied on certain goods which were not sold for want of buyers. Several executions were afterwards successively issued on said judgment, the last of which was returned levied on certain goods and a delivery-bond taken from *Stuck*, with *Givan* his surety, which bond was forfeited. A *scire facias* issued on the delivery-bond, and judgment was rendered against the obli-

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gors. A *feri facias* issued on the last-named judgment, which was returned "no property found." A *feri facias* was then taken out against *Stuck* on the original judgment against him, which was returned "no property found." After these proceedings, the present suit by *scire facias* was commenced.

The only question in the cause is whether the delivery-bond and the proceedings on it are a bar to this suit.

There is no difficulty in this case. By the express language of the statute, the taking of a delivery-bond is not a satisfaction of the judgment. Rev. Stat., 1838, p. 147, sect. 14. After the forfeiture of a delivery-bond, the plaintiff may proceed either on the original judgment or on the bond; and the proceedings on either, unless satisfaction be obtained, can be no bar to subsequent proceedings on the other. The delivery-bond not being a satisfaction of the judgment, may be considered merely as a collateral security. In the case before us, the plaintiffs showed a judgment against *Stuck*, the defendant's entry of himself on the docket as replevin bail, and a *feri facias* on the judgment against *Stuck*, returned "no [*401] *property found." That gave the plaintiffs, *prima facie*, a right to a judgment; and the record shows no valid defense to the suit. The judgment for the defendant is therefore erroneous.

Per Curiam.—The judgment is reversed with costs.

L. Barbour, for the plaintiffs.

H. Brown and *W. Quarles*, for the defendant.

FITCH v. SCHENCK, in Error.

THIS case is the same with *Eldridge et al v. Yantes, ante*, 72, and the decision is the same as in that case.

Runnion v. Beard.

RUNNION v. BEARD.

CONTRACT.—*A* verbally promised *B*, for a valuable consideration, to board him and his family for a certain time. Afterwards *A*, in a bond to *C*, stipulated, at *B*'s suggestion, to board the latter and his family for the same time without charge. Held, that an action would lie on the parol contract.

ERROR to the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Assumpsit by *Runnion* against *Beard* on a parol agreement by which the defendant, in consideration that the plaintiff would surrender and deliver up to him a lease having five months to run, on a certain tavern-house in the town of *LaFayette* commonly called the *LaFayette* House, together with the furniture, &c., undertook to board the plaintiff and family two years, to give him the use of the furniture in room No. 3, and permit him to occupy the room, to provide him with fuel, &c. Averment, that the plaintiff did surrender said lease to defendant, but that defendant refused to board the plaintiff, &c. Plea, non assumpsit. Judgment for defendant.

It appeared that on the 11th of *December*, 1839, one *Abner D. Bond* was the owner of the *LaFayette* House, then occupied by the plaintiff as tenant of *Bond* under a lease which [*402] would *expire on the 8th of *May*, 1840; that on the 11th of *December*, 1839, *Bond* sold the premises to the defendant; that *Runnion* refused to deliver the possession to the defendant, alleging that the unexpired part of the term would be worth to him at least \$1,000; that the defendant thereupon agreed verbally with the plaintiff, that if he would surrender the possession, he would permit him to occupy a certain room in the house to be furnished by the defendant; that he would board the plaintiff and his family two years, &c., to which the plaintiff assented. It also appeared that in the bond which the vendor of the property took from the defendant for the payment of the purchase-money, there was a stipulation made at the suggestion of the plaintiff, that the defendant should board the plaintiff and his family "two years without charge," but the clause was inserted only on the suggestion of

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Runnion, and was not considered as being any part of the contract between *Bond* and the defendant.

The plaintiff thereupon offered to prove by parol the allegations in his declaration, but the Court rejected the testimony and nonsuited the plaintiff.

The contract between the plaintiff and the defendant was upon a consideration moving from the plaintiff to the defendant, and was wholly independent of the contract between *Bond* and the defendant. The clause in the bond given by *Beard* for the payment of the purchase-money, in which he acknowledged that he was to board *Runnion* and his family, &c., was only a recognition of the previous contract between the plaintiff and the defendant. *Runnion* was no party to the latter agreement, and even if it were made for his benefit, he could not, if broken, sue upon it in his own name. *Haskett v. Flint*, 5 Blackf., 69. If the agreement between the plaintiff and defendant had been under seal, the Court would have done right in rejecting it as evidence of the contract declared on. *Sinard v. Patterson*, 3 Blackf., 353. But it was not so in this case. It was wholly by parol, and the Court should not have rejected the evidence offered.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pettit, for the plaintiff.

D. Mace, *H. S. Lane*, and *S. C. Willson*, for the defendant.

[*403] *FULLER v. WILSON and Another.

EVIDENCE.—Replevin for a horse. Plea, property in a third person. *Held*, that the declarations of such third person that he had sold the horse to the plaintiff, and had no claim to him, were not admissible evidence for the plaintiff.(a)

PRACTICE.—The refusal of an instruction to the jury (the record not showing

(a) *Compton v. Flemming*, 8 Blackf., 153.

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that the instruction was applicable to the case), will be presumed to be correct.

APPEAL from the *Dearborn* Circuit Court.

DEWEY, J.—Replevin for a horse. Pleas, 1, Property in one *John M. Fuller*; 2, Property in *Brown*, one of the defendants. Replications, property in the plaintiff, and issues. Verdict and judgment for the defendants.

On the trial, the plaintiff offered in evidence the declarations of *John M. Fuller*, the person named in the first plea, that he had sold the horse to the plaintiff, and did not claim to be the owner of it. The evidence was objected to and excluded.

We think the rejection of the evidence was right. The plea, that *John M. Fuller* was the owner of the property in dispute did not make him a party to the record. He was a competent witness for the plaintiff; his declarations were hearsay, and not admissible evidence.

There was an instruction to the jury asked for by the plaintiff and refused. As none of the evidence is spread upon the record, we have no means of knowing whether the instruction was pertinent to the facts of the case or not, and must, therefore, presume it to have been correctly refused. This is a point which we have frequently decided.

Per Curiam.—The judgment is affirmed with costs.

A. Lane, for the appellant.

J. Ryman, P. L. Spooner, and D. Macy, for the appellees.

SEANY v. THE STATE.

EXTORTION—EVIDENCE.—An execution for \$110.43 is not admissible evidence to support an indictment for extortion, charging a constable with having collected more than was due on an execution for \$64.00.

SAME.—An indictment in such case should set out the recital in the execution, showing the judgment on which the execution issued; and the names of both parties to the execution should be alleged.

[*404] *ERROR to the *Wayne* Circuit Court.

Seany v. The State.

DEWEY, J.—This was a prosecution for extortion. The indictment charges that the plaintiff in error being a constable, and having had placed in his hands as constable “a certain writ of *feri facias* from under the hand and seal of *Oliver T. Jones*, an acting justice of the peace, &c., commanding him to levy and make the sum of \$64.00 out of the goods and chattels of *John Chapman*, *Joseph F. Chapman*, and *Jacob W. Fisher*, not regarding, &c., did, on, &c., at &c., with force and arms, unlawfully and by colour of his said office, demand and receive of said defendants mentioned in said writ the sum of \$69.00,” being \$5.00 more than was due on said writ. Plea, not guilty. Judgment for the State.

On the trial, the State offered in evidence an execution of *feri facias* issued by the justice named in the indictment, and directed to the plaintiff in error, reciting a judgment in favour of *Edmund Jones* against the persons named as defendants in the execution mentioned in the indictment, for the sum of \$110.43 with interest and costs of suit, and commanding the plaintiff in error “to levy and make the said debt, interest and costs.” An objection to the admissibility of the testimony was overruled.

It is contended by the plaintiff in error that the Court erred in admitting the execution in evidence; and that the indictment is fatally defective. We think he is right on both grounds.

There is a variance between the execution mentioned in the indictment, and that offered in evidence. By one the constable was commanded to make \$64.00, and by the other \$110.43. The execution should have been described in the indictment according to its face; and if the amount called for had been reduced by payments, that fact should have been averred.

The indictment is too vague. The recital contained in the execution showing the judgment on which it issued should have been set out; and the names of both parties to the execution should have been alleged. These averments were necessary in order to enable the party accused to defend himself against a second prosecution for the same offense.

 McCabe and Wife v. Platter.

[*405] **Per Curiam*.—The judgment is reversed. Cause remanded, &c.

J. B. Julian, for the plaintiff.

H. O'Neal, for the State.

MCCABE and Wife v. PLATTER.

SLANDER—EVIDENCE IN MITIGATION.—A *feme sole* brought an action of slander for words charging her with fornication and adultery. Pleas, *not guilty*, and that the words were true. *Held*, that the defendant might prove, in mitigation of damages, the plaintiff's general character as to chastity to be bad: *Held*, also, that evidence in support of the plaintiff's character was inadmissible, until there had been an attempt, by evidence, to impeach it. (a)

ERROR to the *Ripley Circuit Court*.

BLACKFORD, J.—*Emily Platter* brought an action against *John McCabe* and *Margaret* his wife, for slanderous words spoken by the wife, charging the plaintiff with fornication and adultery. Pleas, 1, *Not guilty*; 2, That the words were true. Verdict and judgment for the plaintiff.

The defendants, on the trial, offered to prove the general character of the plaintiff as to chastity to be bad; the evidence was objected to, and the objection sustained. The objection should have been overruled. The evidence was admissible in mitigation of damages, notwithstanding the plea of justification. *Kirkman v. Oxley*, cited in 2 Stark. Ev., 306, note; *McNutt v. Young*, 8 Leigh, 542. These cases are in point; and the same opinion is intimated in *Sanders v. Johnson*, Nov. term, 1841.

After the defendants had closed their testimony—they having given no evidence to impeach the plaintiff's character,—the plaintiff offered to prove her general character to be good; the defendants objected to the evidence; but the objection was

(a) *Miles v. Van Horn*, 17 Ind., 245.

 Wasson and Another v. Canfield.

overruled. Had the general issue alone been pleaded, the evidence would have been clearly in admissible; and we are of opinion that the mere fact that there is a plea of justification, ought not to make any difference. We consider the law to be, that the plaintiff, in a case like the present, can not give evidence in support of his character, until the defendant [*406] *has attempted, *by evidence*, to impeach it. It is decided in *Cornwall v. Richardson*, 1 Ryan & Moody, 305, that such evidence is not admissible for the plaintiff, whether there be a plea of justification or not. The objection in question should, therefore, have been sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Dumont, for the plaintiffs.

W. Lyle, for the defendant.

 WASSON and Another v. CANFIELD.

FALSE IMPRISONMENT—EVIDENCE IN MITIGATION.—Trespass against *A* and *B* for an assault and false imprisonment. *A* pleaded not guilty. He also pleaded as follows: That at the time of the trespass, &c., he was a justice of the peace, &c.; that a felony had been committed, &c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out); that, on, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that thereupon, afterwards, &c., the defendant being a justice of the peace as aforesaid, by reason of such felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty of such felony, and of such reasonable ground of suspicion and belief that the plaintiff was so guilty,—commanded said *B* to arrest the plaintiff, and take him before some justice of the peace, &c.; that *B*, in pursuance of said command, gently laid his hands on the plaintiff, and took him before *C*, a justice of the peace, &c., to be dealt with, &c.; which is the same trespass, &c. *A* also pleaded a second special plea which was similar to the first, except that it did not allege that he was a justice of the peace. *Held*, on general demurrer, that these special pleas of *A* were bad for this reason, if no other, that they omit to set out the ground upon which the suspicion and belief of the plaintiff's guilt were founded.

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B pleaded not guilty. He also pleaded as follows: That at the time of the trespass, &c., he was a constable, &c.; that a felony had been committed, &c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out); that afterwards, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that one *A* and others charged the plaintiff with being guilty of said felony, and informed this defendant, he being a constable, &c., that the plaintiff was guilty; that afterwards, &c., this defendant, constable as aforesaid, by reason of said felony, having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty thereof, and of reasonable ground for such suspicion and belief, and of said charge and information of *A* and others, for the purpose of carrying the plaintiff before some justice of the peace to be dealt with, &c., gently laid his hands on the plaintiff and took him before one *C*, a justice of the peace, &c., to be dealt with, &c.; which is the same trespass, &c. *B* also pleaded a second special plea which was similar to his first, except that it did not allege that he was a constable. *Held*, on general demurrer, that these special pleas of *B* were bad for not showing that his informant stated the facts by which he knew or believed the plaintiff to be guilty, and for not setting out those facts.

Held, also, that a warrant, illegal on its face, which had been issued by the defendant *A* as justice of the peace, and under which the defendant *B* had made the arrest, &c., and which had been referred to by the plaintiff's witness, was admissible evidence for the defendants in mitigation of damages.

Held, also, that the defendants might prove, in mitigation of damages, that at and shortly before the time of the arrest, &c., there was in the plaintiff's neighbourhood an association of persons engaged in making and passing counterfeit money, &c., and that the plaintiff was generally reputed and believed there to have been one of that association; but that the facts that the plaintiff was one of that association, and had been engaged in passing counterfeit money knowingly and with intent to defraud the public, should be specially pleaded.

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was an action of trespass for an assault and false imprisonment, brought by *William C. Canfield* against *Richard Wasson*, *James Robb* and *William Madden*. After the filing of the declaration, the death of *Madden* was suggested, and the cause was ordered to proceed against the other defendants. *Wasson* pleaded the general issue and two special pleas. The first special plea is to the following effect: That at the time of the trespass, &c., the defendant was a justice of the peace, &c.; that a felony had been committed,

&c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out) • that on, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that thereupon, afterwards, &c., the defendant being a justice of the peace as aforesaid, by reason of such felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty of such felony, and of such reasonable ground of suspicion and belief that the plaintiff was so guilty, commanded said *Robb* to arrest the plaintiff and take him before some justice of [*408] the peace, &c.; that *Robb*, in *pursuance of said command, gently laid his hands on the plaintiff, and took him before one *John J. Cross*, a justice of the peace, &c., to be dealt with, &c.; which is the same trespass, &c. The second special plea is similar to the first, except that it does not allege that the defendant was a justice of the peace.

Robb also pleaded the general issue and two special pleas. The first of his special pleas was to the following effect: That at the time of the trespass, &c., he was a constable, &c.; that a felony had been committed, &c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out); that afterwards, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that one *Richard Wasson* and others charged the plaintiff with being guilty of said felony, and informed this defendant, he being a constable, &c., that the plaintiff was guilty; that afterwards, &c., this defendant, constable as aforesaid, by reason of said felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty thereof, and of reasonable ground for such suspicion and belief, and of said charge and information of said *Wasson* and others, for the purpose of carrying the plaintiff before some justice of the peace to be dealt with, &c., gently laid his hands on the plaintiff and took him before one *John J. Cross*, a justice of the peace, &c., to be dealt with, &c.; which is the same tres-

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pass, &c. The second special plea of this defendant is similar to the first, except that it does not allege that he was a constable.

The special pleas of both the defendants were demurred to generally; and the demurrers were sustained.

The special pleas of *Wasson* are bad for this reason, if no other, that they omit to set out the ground upon which the suspicion and belief of the plaintiff's guilt were founded. Whether the suspicion against the plaintiff was reasonable or not was a question of law for the Court to decide, and the pleas should consequently have shown the cause of suspicion. *Mure v. Kaye*, 4 Taunt., 34. The first of these pleas, it is true, states that the defendant was a justice of the peace, but that is no excuse for the omission we have mentioned.

[*409] *The special pleas of *Robb* state not only that there was a reasonable suspicion, &c., but, also, that he was informed by *Wasson* and others that the plaintiff was guilty; and the defendant is alleged in the first of these pleas to be a constable. We think, however, that even the first of these pleas should have gone further, and have shown that the defendant's informant stated the facts by which he knew or believed the plaintiff to be guilty; and that the pleas should have set out those facts, in order that the plaintiff could have taken the opinion of the Court on their sufficiency to raise a reasonable suspicion against him. Unless they were sufficient for that purpose, the arrest was not authorized. *Davis v. Russell*, 5 Bing., 354.

The demurrers to the pleas were, therefore, correctly sustained. After the decision of the Circuit Court on the demurrers, the cause was tried on the general issue. Verdict and judgment for the plaintiff.

The plaintiff's testimony on the trial was substantially as follows: On, &c., the defendants stopped at a house about a mile from where the plaintiff lived, and said they were going to take the plaintiff for passing counterfeit money. *Wasson*, who was a justice of the peace, handed *Robb*, who was a constable, a paper which, he said, was a warrant for the arrest of

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the plaintiff, and which the witness thought was read to him. *Wasson* said, at the same time, that if the plaintiff had let *William Madden* alone, or had not sued him, he would have let the plaintiff alone, or would not have prosecuted him. The defendants proceeded to the town where the plaintiff lived; and *Robb* arrested him, and took him to a house in the town where they met *Wasson*. *Wasson* was not present at the arrest, but appeared afterwards to be countenancing it, &c.; he said that he was the prosecutor, and told the plaintiff that if he had let *Madden* alone, he, *Wasson*, would have let him alone, and would have been his friend too. The plaintiff was then taken before a justice of the peace, who, after examining the cause, discharged the plaintiff.

After the plaintiff's testimony was closed, the defendants offered to read in evidence the following warrant [*410] issued by **Wasson*, who was then and there a justice of the peace: "State of *Indiana*, *Jefferson* county, ss. To any constable of said county, greeting: Whereas complaint has been made before me *Richard Wasson*, a justice of the peace of said county, on the oath of *George Monroe*, that on the — day of *November*, 1839, at the county aforesaid, *Wm. C. Canfield*, of said county, did pass and deliver to him, said *Monroe*, two \$3.00 bills purporting to be on the Northern Bank of *Kentucky*, payable at *Covington*, which said bills he, said *Monroe*, did pay into the office of *Richard Wasson*, justice of the peace, to said *Wasson*, on a judgment in favour of *William M. Blackford* against said *Wm. C. Canfield*, one of which said bills said *Monroe* believes to be counterfeit from the statement of said *Canfield*. You are, therefore, hereby commanded to take *Wm. C. Canfield*, and him forthwith bring before me or some other justice of said county, to answer to said complaint, and be further dealt with according to law. Given under my hand and seal this 8th day of *December*, 1839. *Richard Wasson*, J. P. (seal)." The defendants also offered to prove that said warrant was placed in the hands of *Robb*, who was then and there a constable, to be executed, and that by virtue thereof the alleged arrest and imprisonment took place.

The warrant thus offered in evidence was objected to, and the objection was sustained.

We think this objection should have been overruled. The mere passing of a counterfeit bank note not being a criminal offense, the warrant was illegal on its face, and was no justification for either of the defendants. *Sandford v. Nichols*, 13 Mass., 286; *Hall v. Rogers*, 2 Blackf., 429; *Poult v. Slocum*, 3 Blackf., 421. But as the warrant had been referred to by the plaintiff's witness, was a part of the circumstances under which the arrest and imprisonment took place, and was not a justification, it was admissible in mitigation of damages.

The defendants also offered to prove that at and shortly before the time of the arrest and imprisonment, there was in the plaintiff's neighborhood an association of persons, who were engaged in making and passing counterfeit money, particularly \$3.00 bills on the Northern Bank of *Kentucky*; and that

[*411] the plaintiff was generally reputed and believed in *the neighborhood to have been one of that association. This evidence was objected to, and the objection was sustained.

We think this testimony was also admissible in mitigation. In estimating the damages, the motives of the defendants in making the arrest were a proper subject of inquiry; *Chinn v. Morris*, 2 Carr. & Payne, 361; and in determining whether they were actuated by malice, or by a desire to bring an offender to justice, it might be important to know whether the facts existed which the defendants here offered to prove.

The defendants also offered to prove that the plaintiff was one of the said association, and had been engaged in passing counterfeit money knowingly, and with intent to defraud the public. This evidence was objected to, and correctly rejected. The facts offered to be proved amounted to a justification, and ought to have been pleaded.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

M. G. Bright, for the plaintiffs.

S. C. Stevens, for the defendant.

JOHNSON and Another v. PRATHER, in Error.

IN assumpsit against *A* and *B*, the plaintiff offered in evidence a paper purporting to be an answer of *A* to a bill in chancery filed against him and *B* in the *Clark* Circuit Court. There was no proof of *A*'s signature to the paper, nor that it was entitled to the character given to it by the plaintiff. *Held*, that the evidence was inadmissible. *Doughton v. Tillay et al.*, 4 Blackf., 433.

RIDENOUR and Another v. MCCLURKIN.

PAYMENT.—The payment of a debt in treasury notes of the State at par, which had recently depreciated in value, is good, if the payer did not know of the depreciation, or if both parties knew, or had the same means of knowing, the value of the notes, and the payment was made in good faith.

[*412] *APPEAL from the *Union* Circuit Court.

SULLIVAN, J.—Assumpsit on a promissory note by *McClurkin* against the appellants. The defendants below pleaded: 1, Non assumpsit; 2, Payment; 3, As to \$655 part of the sum demanded, payment in treasury notes of the State of *Indiana*, which the plaintiff received in satisfaction and discharge of so much of said debt, &c.; 4, As to \$655, part, &c., payment generally. *Similiter* to the first plea. Replication to the second plea, denying the payment. To the third plea, the plaintiff replied that it was true that the defendants did, on, &c., deliver to said plaintiff the sum of \$655 in treasury notes of the State of *Indiana*, issued under the law of the 15th of *February*, 1840, and which were intended to be in discharge of so much of said note, but that at the time of the delivery and acceptance thereof as in said plea alleged, they falsely and fraudulently represented to the plaintiff, that said notes were good and current as a circulating medium of the

country, as they had been uniformly theretofore, when in truth and in fact the said notes were then, and for a long time previously had been, to wit, &c., greatly under par and depreciated, &c.; and further that said plaintiff did, on the same day on which said pretended payment was made, and so soon as he discovered their depreciated character, tender the same to the defendants and offer to return them, but they refused to accept them, &c. The replication to the fourth plea was substantially the same as the replication to the third. Demurrers to the replications were filed by the defendants, and overruled by the Court. The issues on the first and second pleas were, by consent of parties, tried by the Court, and judgment was rendered for the plaintiff.

The following were the facts of the case: The defendants were indebted to the plaintiff \$1,000 by a promissory note payable *March* the 1st, 1842, which note was produced on the trial. On the back of the note a credit was indorsed in the following words, viz., "3d *March*, 1842, Rec'd, on the within note \$655." A witness who was present at the payment of the \$655, and who was *Ridenour's* clerk, stated that it was made in *Indiana* bank paper and scrip, but what proportion [*413] of each was paid he did not know, though he *thought there was not less than \$400 in scrip; that the plaintiff, and the defendant *Ridenour*, by whom the payment was made, both stated at the time that scrip was as good as any other paper to "lay up," though plaintiff said he wanted the money for immediate use. Plaintiff, after *Ridenour* had paid to him all the treasury notes he had, which were then due, informed *Ridenour* that he would not receive any more. Witness further stated, that there was a rumour at the time of payment, that the scrip (as the treasury notes were called), was depreciated, but he did not know whether it was true or not; that the fact was known at the place of *Ridenour's* residence a few days afterwards, when it was understood that it had depreciated 40 *per cent.* at *Cincinnati*. He further stated, that he thought the payment was made about the time the depreciation took place; that it was several days after the

payment was made before he heard that the plaintiff was dissatisfied; that when the payment was made, *Ridenour* offered to the plaintiff paper on the banks of *Cincinnati* and *North Carolina*, which he (*R.*) said he would guaranty to be as good as *Indiana* bank paper, but plaintiff rejected it, saying he preferred the scrip. Another witness stated that until the 5th of *March*, 1842, scrip was passing at par in the neighbourhood; that on the 8th of *March* he told the plaintiff that scrip was *down*; and that about that time plaintiff went to *Ridenour* for the purpose of returning it. Other witnesses testified that the depreciation took place about the last of *February*, and was known in the neighbourhood where the parties resided. On the foregoing testimony, the Court disregarded the payment made by *Ridenour* in treasury notes, and gave judgment against the defendants for the balance due on the note after deducting the payment made in bank paper.

We are not aware of any case, in which it has been decided that a payment in a currency depreciated merely, when there has been no fraud practiced, has been held to be invalid. Where the payer and the payee have been equally ignorant and equally innocent, unless the payment were made in money or paper that was forged, counterfeit, or entirely worthless, the maxim, *melior est conditio defendentis*, has applied. But where there has been a fraudulent concealment or a
 [*414] false *representation, of a matter peculiarly within the knowledge of the payer, the law is otherwise.

In *Puckford v. Maxwell*, 6 T. R., 52, the defendant on being arrested for £80, gave to the plaintiff a draft for £45, saying it would be immediately paid, and agreed to pay the plaintiff the residue of the debt in a few days, whereupon the plaintiff agreed that the defendant should be discharged out of custody. The draft was dishonoured, the defendant having no effects in the hands of the drawee. The Court held that there was no payment in that case; that the party receiving the draft might treat it as a nullity, and act as if no such bill had been given at all. The case of *Stedman v. Gooch*, 1 Esp. R., 3, and others that might be cited, are to the same effect.

In *Markle v. Hatfield*, 2 J. R., 455, the payment of a debt in counterfeit bank bills was held to be no payment. Vide, also, *Young v. Adams*, 6 Mass. R., 182, and *The Pres., Direct., & Co. of the Bank of U. S. v. The Bank of Georgia*, 10 Wheat., 333. And in *Lightbody v. The Ontario Bank*, 11 Wend., 9, S. C. 13 Wend., 101, where payment was made in the paper of a bank which had failed, and the paper of which had ceased to pass as a currency, although the fact was unknown to either of the parties at the time, it was held that the loss fell on the payer.

Admitting the full force of the foregoing decisions, but without adopting either, which for the decision of the present case it is unnecessary to do, they do not meet the question under consideration. The treasury notes which were paid by the appellants, were received by the appellee as so much money and credited on the note. They were a species of currency which passed as money, and for some purposes were better than gold or silver. They were neither counterfeit nor worthless, nor is there any evidence to show that at the time of the payment *Ridenour* knew of their depreciation. And if he did, it does not appear but that their true value was as well known to *McClurkin* as it was to himself. *McClurkin* knowing the source from which they issued, received them, according to common usage, on the responsibility of the maker. All the facts relative to their true value and character seem to have been as well known to the payee as they were to the payer.

[*415] The payment having been made *in good faith, and the notes voluntarily received, we are aware of no principle of law that will authorize him to repudiate the payment.

We are also of opinion that the demurrers to the replications should have been sustained. It does not appear from them, but that both parties knew, or had the same opportunity of knowing, the true value of treasury notes; nor does it appear that there was a false representation by the defendant *Ridenour*, of a fact peculiarly within his own knowledge, in consequence of which the plaintiff was imposed upon, or by which he was led to forego inquiry into a matter within his reach.

Bales and Another v. Binford and Another.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. B. Smith, for the appellants.

S. W. Parker, for the appellee.

BALES and Another v. BINFORD and Another.

CERTIFIED COPY OF LETTERS TESTAMENTARY.—Letters testamentary in the form prescribed by statute, which, when granted, were entered of record in the Probate Court, and were afterwards, when delivered to the executor, certified by the clerk to be true copies of the record, were held to be valid as being the original letters.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—*John Binford* and *Samuel Binford*, as the executors of one *Peter Binford*, sued *Solomon Bales* and *Isaac John* in debt on a promise made to the testator. In the progress of the cause, the defendants craved *oyer* of the letters testamentary, of which profert was made in the declaration. The plaintiffs produced a copy of the will of *Peter Binford*, and of a codicil thereto, attached to which was the following certificate of the clerk of the Probate Court of *Montgomery* county under his signature and the seal of the Court, dated Nov. 8th, 1841: “I, *James W. Lynn*, clerk of the Probate Court of *Montgomery* county, in the State of *Indiana*, do certify the foregoing to be a true copy of the last will and testament and codicil of *Peter*

Binford late of said county, deceased, and that *John* [*416] and *Samuel Binford*, the executors *therein named,

have duly proved the same according to law, and are authorized to take upon themselves the administration of the estate of the said testator according to the said will. Witness,”

&c. Then followed another certificate under the hand and seal of the same clerk and Court, dated *January 3d*, 1842: “State of *Indiana*, *Montgomery* county, ss. I, *James W. Lynn*, clerk of the Probate Court of the said county, certify that the foregoing is a true copy of the last will and testament of *Peter Bin-*

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Jord, late of said county, deceased, and codicil thereto annexed, and also a true copy of the letters testamentary, granted therein by said Court, from the records thereof; and that said letters testamentary remain in full force. Witness," &c. The defendants objected to the sufficiency of the *oyer*, but the Court overruled the objection. An issue of fact was formed by the pleadings. Judgment for the plaintiffs.

The only question presented for decision is the validity of the *oyer*. The letters testamentary produced are in the form prescribed by the statute. R. S., 1838, p. 199. The objection made to the *oyer* is that a copy of the letters testamentary, and not the original, was exhibited by the plaintiffs. We do not think this objection is well taken. It is evident from the two certificates of the clerk that, when the letters were granted, instead of being made out and delivered to the executors, they were entered of record, and that afterwards, when they were delivered to them, they were certified to be of record. This we conceive was sufficient.

Per Curiam.—The judgment is affirmed with costs.

D. Mace, for the plaintiffs.

H. S. Lane and *S. C. Willson*, for the defendants.

 COMPARET v. HEDGES.

VENDOR AND PURCHASER — RESCISSION OF CONTRACTS.—The holder of a bond conditioned for the conveyance to him of certain land when the price, payable by installments, shall be paid, can not rescind the contract on account of the obligor's not being ready to convey the land at the time specified by the contract, if he has since accepted a conveyance.^(a)

PRACTICE.—If no objection be made to an instruction to the jury when it is given, it can not be objected to on error.

[*417] *ERROR to the *Allen* Circuit Court.

DEWEY, J.—*Comparet* sued *Hedges* before a justice of the peace on a promissory note, by which the latter promised

(a) *Patten v. Stewart*, 24 Ind., 332.

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to pay the former \$28.62, "balance on first payment on lots in the town of *Somerset*;" date of the note, *May* the 7th, 1836. The defendant filed no plea. The cause was appealed to the Circuit Court. Verdict and judgment for the defendant.

On the trial, after the plaintiff had given the note in evidence, the defendant proved that the plaintiff, together with one *Platter* and one *Burns*, had executed to him several bonds of the same date as the note, each conditioned for the conveyance to the defendant by the obligees of a certain lot in *Somerset*, upon the payment of three promissory notes executed by the defendant, of even date with the bond, each for the sum of \$60.62½—the first payable in six, the second in twelve, and the third in eighteen months from date. Each bond was for the conveyance of a different lot, but referred to the same notes. He also proved that the obligees had recovered a judgment against him on these notes, and that previously to the rendition of the judgment, and several months after the last note became due, he had received from them a deed of conveyance of all the lots, which deed he read to the jury. The Court instructed the jury that if they found from the evidence the note sued on in this cause was given for a part of the price of the lots named in the title bonds, and that the plaintiff was not ready to make the defendant a deed for the lots at the time the last note named in the bonds became due, the defendant had a right to consider the contract as abandoned, and they might find a verdict for him.

This instruction was clearly wrong. The defendant, by accepting the deed, had waived his right to rescind the contract in consequence of the unreadiness of the plaintiff, or of the other obligees, to make him a conveyance of the lots upon the payment of the purchase money at the time the last note became due. But as no objection was made to the charge when it was given, it is too late to take exceptions to it now.

The judgment must, however, be reversed. There [*418] was a *motion for a new trial which was overruled.

The testimony is spread upon the record; and if there is any evidence at all that the note, which is the foundation of

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the action, had any connection with the title bonds, or the lots named in them, it is extremely slight, and not sufficient to justify the verdict.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. Johnson, for the plaintiff.

H. Cooper, for the defendant.

CROSBY and Another v. TICHENOR.

PLEADING.—Assumpsit in a justice's Court. The declaration stated, in substance, that the defendant had received from the plaintiff certain bottles of cough drops at a certain price, to be sold for him or returned; and that payment for such as had been sold, and a return of the residue had been demanded and refused. *Held*, that the declaration was sufficient.

ERROR to the *Montgomery* Circuit Court.

BLACKFORD, J.—The plaintiffs in error sued the defendant in assumpsit before a justice of the peace. A statement of demand was filed, which is in substance as follows:

That on, &c., at, &c., the defendant, by a certain writing, acknowledged to have received from the plaintiffs, by the style of *O. and S. Crosby*, certain bottles of cough drops at thirty-seven and a half cents a bottle, promising to sell said bottles of drops for the plaintiffs and pay them said price for those sold, and return those unsold when called for; that on, &c., at, &c., the plaintiffs demanded payment for such of said bottles as had been sold, and a return of those unsold; yet the defendant, though often requested, did not pay the plaintiffs for the bottles so sold, or any part thereof, nor would he return the residue which were unsold. Damage \$100.

The defendant moved that the suit be dismissed for want of a sufficient cause of action; but the motion was overruled.

The justice tried the cause, and gave judgment for the plaintiffs. The defendant appealed.

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[*419] *In the Circuit Court, the cause was dismissed on motion of the defendant, on the ground that the statement of demand was insufficient.

We think this cause ought not to have been dismissed. The declaration is informal, but it is quite sufficient for a justice's Court. It is objected to for not averring a sale of any of the bottles of drops, or a demand and refusal to account for those sold. The statement is, that the bottles were left with the defendant to be sold or returned, and that payment for such as had been sold, and a return of the residue, had been demanded and refused; and that is sufficient.

Per Curiam.—The judgment is reversed 'with costs. Cause remanded, &c.

R. A. Lockwood and D. Mace, for the plaintiffs.

H. S. Lane and S. C. Willson, for the defendant.

WRIGHT v. BASYE.

AMENDMENT OF PLEADINGS—CONTINUANCE.—If in a suit on a sealed note, the declaration be so amended as to describe a different note from that previously described, the defendant is entitled to a continuance.

SAME.—The defendant's objection to the refusal of a continuance is not waived by a subsequent withdrawal of his plea.

ERROR to the *Spencer Circuit Court*.

BLACKFORD, J.—This was an action of debt brought by *Basye* against *Wright*.

The declaration first filed stated that the defendant, on, &c., at, &c., by his writing obligatory, &c., promised the plaintiff to pay him, one day from and after the day and date of said writing obligatory, the sum of \$274.31, together with interest on said sum of \$274.31 from the day and date of said writing obligatory, at the rate of six *per cent. per annum* till paid, yet, &c.

The plaintiff, by leave of the Court, amended the declaration

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by striking out the following words, "together with interest on said sum of \$274.31 from the day and date of said writing obligatory, at the rate of six *per cent. per annum* [*420] till paid." *The defendant, on account of said amendment, moved for a continuance of the cause, but the motion was overruled.

The defendant, afterwards, withdrew the pleas he had previously filed, and the plaintiff withdrew his replications.

There was judgment by default for the plaintiff.

The error assigned is the refusal of the Court to continue the cause.

If the amendment was in matter of substance, the defendant was entitled, by statute, to a continuance. R. S., 1838, p. 451. The note, according to the first declaration, drew interest from the day of its date; but according to the amended declaration, it drew interest from the next day after its date. The amended declaration, therefore, describes a different note from that described in the original declaration; and the amendment was, consequently, a substantial one.

The plaintiff contends that the subsequent withdrawal of the pleas was a waiver of the objection to the decision refusing a continuance; but we do not think so.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. Lockhart, for the plaintiff.

J. Pitcher, for the defendant.

WEST v. WALKER and Others, in Chancery.

A DEFENDANT in chancery being in prison on a writ of *ne exeat* to secure his performance of a decree for a pecuniary demand against him claimed by the bill, was discharged from custody on motion, under the act of 1842 abolishing imprisonment for debt, no fraud on the subject being shown

NEFF and Another v. POWELL and Others.

IMPRISONMENT FOR DEBT.—A defendant in custody on a *capias ad satisfaciendum* may be discharged without prejudice, under the act of 1841, by the attorney at law for the plaintiff.

[*421] *PRACTICE.—If a rejoinder be double, the plaintiff may demur to it for duplicity; but if he surrejoins, he must answer both parts of the rejoinder.

ERROR to the Dearborn Circuit Court.

SULLIVAN, J.—This was an action of debt on a prison-bonds bond. The bond and the condition, after *oyer* craved, were spread on the record. The breach, which was assigned in the replication, stated that the plaintiffs had recovered a judgment against *Powell* and *Harwood* for the sum of \$174.93; that to have execution of said judgment, a *ca. sa.* was issued against them, by virtue of which *Powell* was arrested and imprisoned; that for the purpose of obtaining the benefit and privilege of the prison-bonds, he entered into said bond with the other defendants as his sureties; that afterwards, to wit, &c., without being discharged by due course of law, he did unlawfully escape and go at large, &c. The defendants rejoined, that *Powell* did remain a true prisoner until the ——— day of ———, when *E. Dumont*, who was the attorney at law of the plaintiffs in obtaining said judgment and issuing said execution, and who was then and there the agent of the plaintiffs, and having as such agent and as such attorney full power and authority to discharge said *Powell*, did direct him to be discharged out of custody without prejudice, &c. The plaintiffs surrejoined, that they did not authorize nor empower said *Dumont* to discharge said *Powell* in manner and form, &c. Special demurrer to the surrejoinder. Demurrer sustained, and judgment for the defendants.

The statute of 1841, p. 125, enacts, "That whenever an execution-defendant may be in custody on a writ of *capias ad satisfaciendum*, it shall be lawful for the execution-plaintiff or plaintiffs, his, her, or their agent or attorney, to direct the said

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defendant to be discharged without prejudice," &c. The pleadings in this case require us to determine whether the statute embraces attorneys at law.

It has been decided that the attorney on record can not, by virtue of his general character as attorney, discharge a defendant from execution without satisfaction. *Jackson v. Bartlett*, 8 J. R., 361; *Savory v. Chapman*, 11 Ad. & Ellis, 829. We are of opinion, however, that the statute referred to was intended to embrace the plaintiff's attorney in the [*422] action. From its analogy to other statutes in which similar terms are employed, and which are acknowledged to apply to attorneys at law, and from the power conferred, we think the statute should receive that construction.

A discharge, therefore, by the plaintiffs' attorney in the action without prejudice, &c., is binding on the plaintiffs.

It follows that the surrejoinder was bad, for not traversing the allegation that the discharge was made by direction of *Dumont* as the attorney of the plaintiffs, as well as the averment that it was made by his direction, as the agent of the plaintiffs thereunto authorized. Admitting that the rejoinder was also bad for duplicity, yet if the plaintiffs did not demur to it specially for that reason, they should have traversed both parts of it. 1 Chitt. Pl., 565.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman and *P. L. Spooner*, for the plaintiffs.

J. Dumont, for the defendants.

THE STATE v. CAIN.

FAILURE TO RETURN MARRIAGE CERTIFICATE—INDICTMENT.—An indictment was found at the *April* term, 1841, &c., in substance as follows: That the defendant being a justice of the peace, &c., did, on, &c., at, &c., solemnize a marriage between *Justin Wait* and *Submit Flint*, by virtue of a license issued by the clerk, &c., the said *S. Flint* being a resident of the county, and the parties competent to contract, &c.; and that the defendant

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having solemnized the marriage, failed and neglected to file in the clerk's office a certificate of the marriage within three months after the same was solemnized, and for a long time thereafter, viz., for one year, &c. Plea in abatement, that the names of the grand jurors were not selected or caused to be selected by the board doing county business, &c., at their *May* session in 1840, from the list of taxable persons, &c. *Held*, that the indictment was good and the plea bad.

ERROR to the *LaGrange* Circuit Court. The indictment in this case was found at the *April* term, 1841.

SULLIVAN, J.—This was an indictment for violating the 6th section of the act to regulate marriages, R. S., 1838, p. 410. The indictment charges that the defendant being a justice of the peace of the county of *LaGrange*, did, on, &c., in the said county of *LaGrange*, solemnize a marriage between [*423] one **Justin Wait* and one *Submit Flint*, by virtue of a license issued by the clerk of the *LaGrange* Circuit Court, the said *S. Flint* being then and there a resident of said county, and the parties competent to contract, &c.; and that the defendant having solemnized said marriage, did fail and neglect to file in the clerk's office of said county a certificate of said marriage within three months after the same was solemnized, and for a long time thereafter, to wit, for the space of one year, &c. A plea in abatement was filed to the indictment, alleging that the grand jurors by whom said bill was found, were not legally drawn and impaneled, &c., in this, to wit, that the names of said supposed grand jurors were not selected or caused to be selected by the board doing county business, &c., at their *May* session of said board in the year 1840, from the list of taxable persons, &c. There was a demurrer to the plea, which was sustained by the Court. A motion was then made to quash the indictment, which was also sustained by the Court. We see no good objection to the indictment. The offense is charged against the defendant very distinctly, indeed we do not see how it could be more so.

The Court did right in sustaining the demurrer to the plea in abatement. It is not necessary to a legal grand jury that the members of it should be drawn as was contended for by the defendant in his plea. Acts of 1841, p. 126.

Henkle v. German.

The Court erred in quashing the indictment, and the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. H. Coombs, for the State.

H Cooper, for the defendant.

HENKLE v. GERMAN.

EVIDENCE—JUSTICES' TRANSCRIPT.—*Scire facias* to have execution against real estate on a justice's transcript. *Held*, that the execution issued by the justice and its return, if denied, must be proved by producing the original execution and return, or copies certified by the justice, or sworn copies. (a)

[*424] *ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was a *scire facias* to show cause why execution should not issue against real estate, on the transcript of a judgment of a justice of the peace. Plea, that no execution had issued on the judgment in the *scire facias* mentioned in manner and form as therein alleged. The cause was submitted to the Court, and judgment rendered for the defendant.

The plaintiff gave in evidence the transcript of the judgment, &c., described in the *scire facias*, and a certificate of the justice "that an execution had issued in the cause, and been returned no goods or chattels found on which to levy." The transcript of the judgment, &c., after setting out the recovery of the judgment in the cause, proceeds as follows: "Execution issued August 2d, 1841, but no goods and chattels found on which to levy." And then follows the justice's certificate that the transcript is correct. There was no other evidence in the cause than that which we have stated.

We think the judgment for the defendant is correct. The transcript of the entries on the justice's docket did not show

(a) 2 Ind., 434; 3 Id., 571.

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that a legal execution on the judgment had issued against the debtor's goods, and been returned *nulla bona*. To prove that such an execution had issued and been so returned, the plaintiff should have produced the original execution and return, or copies of them certified by the justice, or sworn copies. This is the kind of evidence of the execution and return alleged in a *scire facias* against replevin bail, which the plaintiff is required to produce; *Snyder v. Norris*, Nov. term, 1841; and the rule must be the same in the case before us.

Per Curiam.—The judgment is affirmed with costs.

A. Ingram, for the plaintiff.

D. Mace, for the defendant.

HOLTON v. SMITH, in Error.

THE declaration in debt on a recognizance of special bail need not aver that a *capias ad satisfaciendum* had [*425] issued *against the principal and been returned *non est inventus*. But such writ and return, if denied by plea, must be proved. *Brison v. Street*, 5 Blackf., 359.

BEARD and Another v. KINNEY and Another.

JURISDICTION.—In debt before a justice of the peace, a delivery-bond in the penalty of \$208 was filed as the cause of action; the value of the property to be delivered not being stated, and there being no statement limiting the demand to \$100 or less. *Held*, that the justice had no jurisdiction.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—Debt before a justice of the peace. The only cause of action filed was a bond in the penalty of \$208, conditioned for the delivery of certain property (its value not stated), which had been taken on an execution in favour of the plain-

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tiffs against one of the defendants. The justice indorsed on the summons, "Debt \$94.18; dam. \$9.40." The defendants moved the justice to dismiss the action, on the ground that he had no jurisdiction of the cause. The motion was overruled, and the plaintiffs obtained final judgment. The defendants appealed, and in the Circuit Court renewed the motion to dismiss for want of jurisdiction in the justice. The motion prevailed. This is the error assigned.

This Court has heretofore decided that, on a bond conditioned for the delivery of property the penalty of which was over \$100, a suit might be maintained before a justice of the peace, provided the plaintiff, in the statement of his cause of action, did not claim over \$100. *Washburn et al. v. Payne*, 2 Blackf., 216. That decision is not applicable to the present cause. Here is no statement of the plaintiffs' claim other than the bond itself, and that calls for an amount above the jurisdiction of a justice. The indorsements on the summons do not mend the matter. The justice had no right to issue the summons, the plaintiffs not having shown by a statement of their demand that they claimed a sum within the justice's jurisdiction. Besides the aggregate of the two sums marked on the summons amounts to more than \$100. These [*426] sums must have reference to the amount *due on the execution mentioned in the condition of the bond, and could be recovered in this action only in the shape of damages; therefore, could we look to the indorsements on the summons to ascertain the amount demanded by the plaintiffs, that amount would exceed the jurisdiction of a justice. The cause was correctly dismissed.

Per Curiam.—The judgment is affirmed with costs.

D. Mace, for the plaintiffs.

G. S. Orth, for the defendants.

Pine v. Pro and Another.

PINE v. PRO and Another.

CONTINUANCE, AFFIDAVIT FOR.—The defendant's affidavit for a continuance stated, that he had been unable to prepare for trial in consequence of severe bodily affliction, under which he had laboured ever since and long before the process was served; that he believed he had a meritorious defense and could be ready for trial at the next term; and that the affidavit was not made for delay. *Held*, that the affidavit was insufficient.(a)

ERROR to the *Martin* Circuit Court.

DEWEY, J.—Case for obstructing a water-course. Plea, not guilty. Verdict and judgment for the plaintiffs.

Before entering into trial, the defendant moved the Court for a continuance of the cause. The motion was founded on an affidavit of the defendant made in open Court, setting forth that he had been unable to prepare for the trial in consequence of "severe bodily affliction," under which he had laboured ever since the service of process upon him, and for a long time before; that he believed he could be in readiness for trial at the next term; that in his belief he had "a meritorious defense to the action;" and that the affidavit was not made for delay but for justice. The Court overruled the motion, and refused a continuance. This is the only error assigned.

The propriety of refusing or granting continuances depends so much upon the discretion of the Court to whom the motion is made, that it must be a very strong case which would induce this Court to revise a decision on that subject. The affidavit in question does not make out such a case. It is in [*427] *various respects too vague. Among its defects is the omission to state what the defendant expected to prove. It was necessary the Court should know the facts upon which he depended, in order to be able to judge whether his defense was meritorious or not; and they should have been stated, that the adverse party might have admitted them had he been so disposed. Besides, the affiant was before the Court, who could perhaps, from his appearance, form an opinion

(a) *Warrels v. The State*, 26 Ind., 32.

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whether his "bodily affliction" had been such as to disable him from making the necessary preparation for trial.

Per Curiam.—The judgment is affirmed, with five *per cent.* damages and costs.

G. G. Dunn, for the plaintiff.

J. S. Watts, for the defendants.

BOLES, Treasurer, &c., v. McCARTY.

LIQUOR SELLER'S BOND.—The declaration in debt on a bond stated that the condition, after reciting that the defendant had been licensed to retail spirituous liquors, &c., was, that should the defendant not permit any gambling, rioting, or disorderly conduct in his house, but conform to the laws of the State restraining gambling, rioting, and disorderly conduct in his house, and should he not suffer any unlawful assemblies, or sell or retail any spirituous liquors on the Sabbath day except to travelers, then the bond to be void. Breaches assigned: 1, That the defendant did permit disorderly conduct in his house in this, viz., that, on, &c., he permitted *A, B, and C*, to conduct themselves in a disorderly manner in his house, by then and there fighting and quarreling together, &c.; 2, That the defendant suffered unlawful assemblies in and about his house during the continuance of his license, &c.; 3, That the defendant, during the continuance of his license as aforesaid, sold and retailed spirituous liquors on the Sabbath to divers persons who were not travelers, viz., one pint of whisky to *A*, one pint of brandy to *B*, and one pint of whisky to *C*, &c.; 4, That the defendant permitted gambling, rioting, and disorderly conduct in his house during the time for which he was licensed as aforesaid, and did not conform to the laws restraining gambling and disorderly conduct about taverns and public houses, &c.

Held, that the bond was valid. *Held*, also, that though the bond was described in the declaration as payable to *B*, treasurer of *H.* county, and appeared on *oyer* to be payable to *B*, treasurer of *H.* county, or his successors in office, the variance was immaterial. *Held*, also, on general demurrer, that the first breach was good and the second and fourth bad. *Held*, also, that the third breach was bad, on special demurrer, for duplicity.

[*428] *ERROR to the *Huntington* Circuit Court.

SULLIVAN, J.—Debt. The declaration is upon a bond in the penalty of \$500 with a condition in which, after reciting that, on, &c., a license had been granted to the defend-

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ant to retail spirituous liquors in the town of *Huntington, &c.*, it was stipulated "that should the said *McCarty* not permit **any** gambling, rioting, or disorderly conduct in his house, but conform to the laws of the State restraining gambling, rioting, and disorderly conduct in his house, and should he not suffer any unlawful assemblies, or sell or retail any spirituous liquors on the Sabbath day except to travelers, then said writing was to be void, &c. In the declaration four breaches were assigned, as follows, viz.: 1, That the defendant did permit disorderly conduct in his house in this, to wit, that, on, &c., he permitted and suffered one *Martin Houser*, one *Lawrence McCarty* and one *John Fowler*, to behave and conduct themselves in a disorderly manner in his house by then and there fighting and quarreling together, making a great noise and disturbance to the great annoyance of the citizens, &c.; 2, That said *McCarty* did suffer unlawful assemblies in and about his house during the continuance of his license, &c.; 3, That the defendant, during the continuance of his license as aforesaid, did sell and retail spirituous liquors on the Sabbath or first day of the week to divers persons who were not travelers, to wit, one pint of whisky to one *Martin Houser*, one pint of brandy to one *Johnson*, one pint of whisky to one *Griffith*, &c.; 4, That the defendant did permit gambling, rioting, and disorderly conduct in his house, during the time for which he was licensed as aforesaid; and that he did not conform to the laws of the State restraining gambling and disorderly conduct about taverns and public houses, &c. The defendant craved *oyer* of the bond and condition, and filed demurrers to each breach. The demurrers to the first, second, and fourth, were general; to the third it was special, and assigned for cause that the breach was double. Judgment for the defendant.

It is contended that no action can be sustained on the bond on which this suit is brought, because it is said the bond is not in conformity with the act to license and regulate taverns and groceries. R. S., 1838, p. 581. We think, however [*429] the requisitions of the statute are substantially complied with. The statute requires that the appli-

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cant for license shall give bond that he will, *inter alia*, "conform to the laws of this State, restraining gambling, and disorderly conduct about *taverns* or *public houses*," &c. The condition of this bond is "that he will conform to the laws of this State restraining gambling, rioting, and disorderly conduct *in his house*, &c." The import of the words in the condition of the bond is that in the house which he (*McCarty*) was about to open, he would conform to the laws of the State for the restraint of gambling, &c., in such places.

Another reason given in support of the judgment of the Circuit Court is that there was a fatal variance between the bond shown on *oyer* and that declared on. The bond declared on is payable to *Henry Boles*, treasurer of *Huntington* county; that shown on *oyer* is payable to *Henry Boles*, treasurer of *Huntington* county, or *his successors in office*. The variance is immaterial. In a suit by *Boles* it was not necessary to notice the obligation to pay to his successors. The validity of the bond would not be affected by the omission of those words, *Redpath v. Nottingham*, 5 Blackf., 267; nor if in the bond is it a variance to omit them in the declaration. 1 B. & Ald., 224; Anon. 12 Mod., 447; Bayley on Bills, 427.

We think the Court erred in sustaining the demurrer to the first breach. It states a distinct traversable fact, which, if true, would be a violation of the condition of the bond. The second and fourth breaches are too general, and the demurrers to those breaches were correctly sustained. The third breach is bad for duplicity, and the demurrer to it was properly sustained. On account of the error of the Court in sustaining the demurrer to the first breach, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

T. Johnson, for the plaintiff.

W. H. Coombs, for the defendant.

Doe, on the Demise of Burge and Others v. Cunningham.

[*430] DOE, on the Demise of BURGE and Others v. CUNNINGHAM.

REPLEVIN-BOND, PROOF OF FILING.—A replevin-bond executed in *June*, 1821, was taken and acknowledged before the clerk of a Circuit Court; the same clerk, since deceased, had issued executions on the bond; and his successor found the bond among the papers of the Court. *Held*, that these facts were sufficient to establish the approval and filing of the bond, under the act of 1821, by the clerk in office at the date of the bond.

SAME, FORM OF.—It is no objection to such a bond that, in reciting the judgment on which it is predicated, it omits a credit entered on the judgment.

EXECUTION.—A *fieri facias* was returned levied on certain land which was not sold for want of time. *Held*, that a *venditioni exponas* might issue, under the act of 1818, commanding the sheriff to sell the land.

SAME.—The *levari facias* authorized by the act of 1818 is substantially a *venditioni exponas*.

EVIDENCE.—The declaration of a clerk, since deceased, who had approved and filed a replevin-bond, that the surety had been deceived as to its execution, &c., is hearsay, and inadmissible as evidence.

ERROR to the *Jackson* Circuit Court.

DEWEY, J.—This was an action of ejectment. Verdict and judgment for the defendant below.

Both parties claimed under *Robert Burge*, deceased—the lessors of the plaintiff as his heirs at law, the defendant as deriving title under a sale of the premises on an execution against him in his lifetime. The plaintiff made out a *prima facie* case. The defendant, having given in evidence a judgment of the *Jackson* Circuit Court in favour of one *Goodwin* against one *Ruggles*, rendered on the seventh day of *June*, 1821, for \$463.98, and costs of suit, subject to a credit of \$2.68, offered a replevin-bond executed by *Ruggles*, and *Burge* as his surety, dated *June* the 30th, 1821, conditioned for the payment of the judgment, &c. This bond was proved by the present clerk of the *Jackson* Circuit Court to have been among the files of the Court at the time he came into office, and was attested as follows: “Signed and acknowledged in presence of *William Crenshaw*, C. J. C. C.” It was indorsed “*J. Goodwin* v. *William B. Ruggles*, in debt. Replevin-bond.” It was

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proved that *Crenshaw* was the clerk at the date of the bond; that the attestation and signature thereto were in his handwriting; that he had issued executions upon the bond; and that he had since deceased. The lessors of the plaintiff [*431] objected to *the admission of the bond in evidence; the objection was overruled, and the bond read to the jury.

The objections now urged against the bond are, 1, There was no proof that it was ever approved by the clerk of the Court, that it had been filed in his office, or made a matter of record; and, 2, That it varied from the judgment upon which it was predicated.

The bond was taken by virtue of the fifth section of a statute passed in 1821, which provided "That if bond with sufficient security, to be approved of by the clerk, shall be filed by the defendant or defendants in the clerk's office prior to the issuing of any execution on the judgment, then and in that case no execution shall issue on the judgment until," &c. Laws of 1821, p. 6. The same statute gave to replevin-bonds, thus approved and filed, the force and effect of a judgment, and provided that if they were not paid an execution should issue upon them. That the bond in question and its surety were approved by the clerk, *Crenshaw*, we think, sufficiently appears by the execution and acknowledgment of the bond before him, by his permitting it to go among the files of his office, and by his issuing executions upon it. As to the filing, it is true, there was no indorsement by the clerk on the bond that it was filed. Such an indorsement, however, could have been only evidence of the filing. The filing itself consisted in the deposit of the bond among the papers of the Court for safe-keeping, a fact which was proved by the present clerk. This was sufficient, under the statute, to authorize the issuing of an execution upon the bond.

The variance urged against the bond is, that in reciting the judgment it omits to state the credit of \$2.68 which had been entered upon the latter. The judgment itself is correctly recited. We do not conceive that a material variance was

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occasioned by that omission. The credit was no part of the judgment. The bond was properly suffered to go in evidence.

The defendant having proved the issuing of a *fi. fa.* on the replevin-bond against *Ruggles* and *Burge*, which was returned by the sheriff that he had seized the premises in dispute but had not sold them for "want of time," offered in evidence [*432] *a venditioni exponas* commanding the sheriff to proceed, &c. It was objected to but admitted.

It is contended that the Court erred in admitting this writ in evidence, because the sheriff's return of the *fi. fa.* was not sufficient to authorize the issuing of any further writ of execution, and because, if any writ could have been lawfully issued, it was a *levari facias*.

This objection is founded upon a statute of 1818, which, in respect to the execution, governed this case. That statute provided that when real estate should be seized upon execution, and the officer should return that he could not sell the same for "want of buyers," the writ of *levari facias* should issue. Laws of 1818, pp. 187, 188. It is true, the return of the *fi. fa.* that the officer had not sold the property for *want of time* was not authorized by the statute; doubtless the officer rendered himself liable to an action for not completing the execution of the writ. But it does not follow that the judgment-plaintiff was not entitled to perfect his remedy by execution. He had a right to the proper writ to compel the sheriff to sell the property. The objection to the form, or rather to the name of the writ in question, is answered by remarking that there is one kind of *levari facias*, which issues when the sheriff has returned that he could not sell the property for want of buyers, commanding him to sell the same. 4 Jac. L. Dict., 136. This kind of *levari facias* is substantially a *venditioni exponas*. The Court committed no error in admitting the execution in evidence. It was such a writ as the statute authorized, and it gave the sheriff authority to sell the land.

The lessors of the plaintiff offered to prove that *Crenshaw*, while he was the clerk, said that *Burge* had been deceived, and had executed the replevin-bond under the expectation

that others would sign it who had not. The evidence being objected to was correctly excluded by the Court. It was clearly hearsay.

Per Curiam.—The judgment is affirmed with costs.

J. W. Payne and *W. T. Otto*, for the plaintiff.

H. P. Thornton, for the defendant.

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*ROLLER v. CUSTAR.

JUSTICE'S JUDGMENT—TRANSCRIPT—PLEADING.—In *scire facias* on a justice's transcript to have execution against real estate, a plea that the defendant had not at the time of filing the plea, nor at any time after the writ issued, any such estate, is bad on general demurrer.

SAME—ALTERATION.—A plea to such suit, that the justice's judgment had been materially altered after the *scire facias* issued, without showing what the alteration was, is insufficient.

SAME.—To pleas in such suit, denying the existence of the *justice's judgment* when the *scire facias* or the execution mentioned in it issued, the plaintiff replied that the justice had, by leave of the Court, amended *his transcript* after the same was filed, by inserting after the verdict a judgment, &c. *Held*, on general demurrer, that the replication was bad.

PRACTICE.—A judgment for the plaintiff in the *scire facias* is erroneous, if there be a plea unanswered denying the existence of the *justice's judgment*.

CERTIFICATE OF JUSTICE.—An allegation in the *scire facias*, that the justice who certified the transcript was an acting justice of the peace, and that the transcript was filed in the *W. Circuit Court*, is sufficient to raise a presumption that he was a justice of *W. county*.

ERROR to the *Wayne Circuit Court*.

DEWEY, J.—*Scire facias* on a justice's transcript for execution against real estate. The writ alleges that the plaintiff, on, &c., recovered a judgment against the defendant for, &c., before *John Benson*, "an acting justice of the peace;" that an execution had issued upon the judgment, and been returned "no property;" that a transcript of these proceedings was certified by the justice, filed in the office of the clerk of the *Wayne Circuit Court*, and recorded in that Court. The defendant in the first instance filed two pleas, 1, That he had not

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at the time of filing the plea, nor at any time after the writ issued, any real estate; 2, There was no such judgment as that named in the *scire facias*. The plaintiff demurred generally to both pleas. The demurrer to the first plea was sustained, and that to the second overruled; whereupon the plaintiff withdrew his demurrer to that plea, but did not reply to it. Several days later in the term the defendant filed a third, fourth and fifth plea. The third plea alleges that, at the time the execution mentioned in the *scire facias* issued, no judgment against the defendant in favour of the plaintiff had been rendered by justice *Benson* as was alleged in the *scire facias*. The fourth plea is, that there was no such judgment as that mentioned in the *scire facias* when the writ issued. The fifth plea [*434] avers that the judgment had been *materially altered after the issuing of the *scire facias*. The plaintiff replied to the three last pleas, that the justice's transcript, as originally filed in the clerk's office, contained the proceedings of the justice in a suit between the plaintiff and defendant in this cause, to the finding of a verdict for the plaintiff for the amount of the judgment named in the *scire facias* and for costs, including the issuing of an execution and the return thereof as set forth in the *scire facias*; that the plaintiff had, during the term at which the replication was filed, procured leave of the Court for the justice to amend his transcript, by inserting after the verdict a formal judgment corresponding with that mentioned in the *scire facias*; and that the justice had done so, and returned a complete transcript (which is set out), before the filing of the three last pleas. The defendant demurred generally to the replication. The Court overruled the demurrer, and rendered final judgment for the plaintiff.

The demurrer to the first plea was correctly sustained. The plea of no real property in the defendant at any time previous to filing the plea, is no bar to the action, because one of the remedies intended to be given by the statute on which it is founded is, as we conceive, an execution against the real estate of the defendant acquired at a subsequent period.(1)

There was no error in overruling the demurrer to the repli-

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cation in regard to the fifth plea. That plea alleges in general terms, that a material alteration was made in the justice's judgment after the issuing the *scire facias*. This is too vague; the alteration should have been specified, that the Court might judge whether it was material or not.

We think the Court erred in sustaining the replication in relation to the third and fourth pleas. Those pleas have reference to the justice's judgment named in the *scire facias*, and deny its existence at certain periods. The replication relates to the transcript, and only avers that the justice, by leave of the Court, amended that by inserting after the statement of the verdict a formal judgment. The replication is, therefore, no answer to the pleas. It does not meet the denials contained in them. If there was no judgment at the time

the execution mentioned in the *scire facias* issued, or
 [*435] *when the *scire facias* itself was sued out, the plaintiff can not maintain this action. If the plaintiff designed to aver in the replication that the judgment, as well as the transcript of it, was amended, he has not accomplished his object. We think it was competent for the justice, during the pendency of the *scire facias*, to amend his docket by entering, *nunc pro tunc*, a formal judgment on the verdict of the jury for damages and costs, which he had already treated as a judgment by issuing an execution upon it. Had the replication averred such an amendment, as well as that of the transcript, it would have been sufficient. Or, the justice having amended the entry on his docket, the replication might have been general, that there was such a judgment.

The Circuit Court also erred in rendering a judgment for the plaintiff over the second plea, which is an absolute denial of the existence of the judgment alleged in the *scire facias*. This plea constitutes a good bar, and it stands unanswered.

It is contended that the *scire facias* is defective for not averring that the justice who certified the transcript was a justice of Wayne county. We do not think this objection can prevail. There is an allegation that he was an acting justice of the peace, and that the transcript of his proceedings was filed

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in the *Wayne* Circuit Court. This we think is sufficient to raise the presumption that he was a justice of *Wayne* county.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman and *M. M. Ray*, for the plaintiff.

C. H. Test, for the defendant.

(1) But see R. S., 1843, p. 943, sect. 98.

KING v. McCAMPBELL.

HUSBAND AND WIFE—PROCESS.—In a suit against husband and wife, the process need only be served on the husband; and such service being made, the subsequent proceedings should be against both the defendants.

ERROR to the *Clark* Probate Court.

BLACKFORD, J.—This was an action of assumpsit brought by *McCampbell* against *George T. King*, executor, and [*436] *Jane *Ann*, his wife, executrix, of the estate of *William Ferguson*, deceased. The process was returned served on the husband, and “not found” as to the wife. On the defendants’ failing to appear to the suit, there was an entry made of their default. Afterwards the Court, on examining the evidence in the cause, rendered final judgment against the defendant *King* alone.

The process having been served on the husband, he was bound to appear for himself and his wife; 3 Chitt. G. P., 263; and as he failed so to appear, the default as to both defendants was correctly entered. The subsequent proceedings against the husband alone are erroneous: they should have been against both the defendants.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Crawford, for the plaintiff.

A. C. Griffith, for the defendant.

White v. Rogers.

EGGLESTON and Another v. THE STATE, in Error.

THE defendant may give in evidence, under the general issue to an indictment, any matter in bar. R. S., 1838, p. 458. But matter in abatement must be pleaded.

WHITE v. ROGERS.

SET-OFF.—Assumpsit commenced before a justice of the peace by *Rogers* against *White*. Plea, payment and set-off. The matter of set-off was a joint and several promissory note for \$51.00, signed *Simmers* and *Rogers*, payable to one *Richards*, and assigned by him to the defendant before the commencement of the suit. Held, that the set-off was admissible. Held, also, that the plaintiff's execution of the note could be denied only under oath.

ERROR to the *Floyd* Circuit Court.

SULLIVAN, J.—This was an action of assumpsit for work and labour, commenced before a justice of the peace by *Rogers* against *White*. The defendant pleaded before [*437] the *justice, 1, Non-assumpsit. 2, Payment in manner following, to wit: That defendant, as assignee of one *Richards*, held a joint and several note executed by the plaintiff and one *Simmers*, payable to said *Richards* one day after date, for the sum of \$51.00, dated *March* the 20th, 1842; and assigned to the defendant before the commencement of the suit; also, that defendant paid the further sum of \$30.00 on, &c. The justice gave judgment for the plaintiff, and the defendant appealed. In the Circuit Court, the only question raised by the parties was whether a note executed by the plaintiff and another person in the following terms could be set off against the plaintiff's demand, viz.: "*New Albany, 20th March, 1842. \$51.00. One day after date, we, or either of us, promise to pay C. Richards, or order, fifty-one dollars for value received. Simmers and Rogers.*" (Indorsed,) "I assign the

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within note to *David B. White. Croel Richards.*" The Court decided that the set-off should not be allowed, and gave judgment for the plaintiff.

The note offered as a set-off was joint and several. It was a separate debt against each of the makers, as well as a joint debt against both. It would be, therefore, if there is nothing else to prevent, a legitimate matter of set-off in a suit by either of the makers against the holder. Per *Ashurst, J.*, in *Fletcher v. Dyche*, 2 T. R., 32.

Another question arises in the case, and that is, whether it should not have been proved that *Rogers* signed the note himself, or at least that he authorized his partner, *Simmers*, to sign it for him. It is admitted that one partner may, by signing a note, bind the co-partnership, but it is denied that he can, as such, bind the partners severally. This may be true, and yet if *Rogers* did not sign the note himself, nor authorize it to be signed for him, he should have denied the execution of it under oath. *Wilson v. Merkle et al.*, May term, 1842. By not doing so, he admitted its execution.

We are therefore of opinion that the Court erred in rejecting the evidence.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Collins, for the plaintiff.

J. G. Marshall, for the defendant.

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*IRISH v. IRISH.

PLEADING—VARIANCE.—In debt on a bond, the declaration alleged the condition to be for the payment of a certain sum of money on a certain day. The condition, as shown on *oyer*, was for the payment of the money out of the profits of certain real estate. *Held*, that the variance was fatal.

ERROR to the *Madison* Circuit Court.

SULLIVAN, J.—Debt by *James M. Irish* against *Samuel D. Irish*, on a bond with a condition. The declaration sets out

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the bond, and states that it was subject to a condition amongst others, as follows, viz.: That the defendant should pay to *Clarissa A. Irish* the sum of \$500, on or before the 1st day of *April*, 1839. The breach assigned is that the defendant did not pay to the said *Clarissa* the said sum of \$500 on the day named in the condition, or at any time since. The defendant craved *oyer* of the bond and condition, and demurred to the declaration. Demurrer overruled, and judgment for the plaintiff.

The condition of the bond, as shown on *oyer*, after reciting that whereas *James M. Irish* had transferred to *Samuel D. Irish* a certificate for a tract of land on which were erected certain mills and machinery, provides that the said *Samuel* shall make certain payments, that is, to one *Alfred Makepiece* the sum of \$600, to *Eliza McClanahan* the sum of \$500, to *Clarissa A. Irish* the sum of \$500, to *Amelia M. Irish* and *Elvira Jane Irish* each the sum of \$500. It is also a part of the condition that as *William C. Irish*, *Calvin W. Irish*, and *James D. Irish* severally arrive at the age of twenty-one years, a deed shall be made to each of them by *Samuel D. Irish* of one-fourth part of the lands and tenements above named, and that, in consideration thereof, they shall be equally bound with *Samuel* for the sums of money above required to be paid. It is then provided "that all of the said payments above named and described are to be made out of the profits and incomes arising from the use of the said lands, mills, and machinery." There are other undertakings and qualifications set out in the condition of the bond which it is not necessary now to notice.

It is difficult to understand, from the condition of the bond, the true meaning of the parties to the contract. Its [*439] stipulations are complicated, and we are of opinion that a fair and equitable adjustment of the rights of the parties can better be had in a Court of chancery than in a Court of law. We have come to the conclusion, however, that the promise to pay the sums of money named in the condition of the bond, amongst which is the sum of \$500 to *Clarissa*, for which the present suit was brought, was not an unconditional

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undertaking; but that the payments were to be made only out of the profits of the estate conveyed.

There is a variance, therefore, between the contract declared on and that shown on *oyer*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Quarles and *A. M. Brown*, for the plaintiff.

H. Brown, for the defendant.

J. LISTER v. BOKER.

STATUTE CONSTRUED.—A penalty is inflicted, by an act of 1840, for issuing any small bill for the purpose of passing the same as a circulating medium, &c.

PRIVILEGE OF WITNESS.—A witness is not bound to answer any question, if his answer will expose him to any criminal punishment or penal liability.

EVIDENCE—ADMISSIONS.—The admissions of the assignor of a note, made after the assignment, are not receivable in evidence to prejudice his assignee.

NEW TRIAL.—It is no ground for a new trial, that a witness for the party asking it, who had been excused from testifying on the trial which had taken place because his evidence might subject him to a penalty, has promised to give evidence in the cause if a new trial should be granted.

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—Assumpsit by *Boker* against *Lister*. The declaration contained two counts. The first was on a promissory note made by the plaintiff in error and payable to one *Nathan Lister*, by *Lister* assigned to *John Wood*, by *Wood* to *John Cain*, and by *Cain* to *Boker*, the defendant in error. The second count was for money had and received, money paid, laid out, and expended, &c. The defendant in the Circuit Court pleaded three pleas: 1, Non assumpsit; 2, To the first count in the declaration, that the note in that count mentioned was given on an illegal consideration in

[*440] *this, that said note was made by the defendant, and indorsed by said *N. Lister* to the said *John Wood*, to

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be discounted by said *Wood* for the defendant; and that *Wood* did at, &c., receive the said note from the defendant, and did then and there issue and pay to the defendant therefor his own, to wit, said *Wood's* individual small bills, part thereof being of the denomination of \$1.00, part of the denomination of \$2.00 bills, &c., payable to his own order, &c., which were then and there issued by said *Wood* to be used as a circulating medium, and as a substitute for small bank notes, &c. The third plea was also to the first count, and was a statutory plea of payment. *Similiter* to the first plea; replications to the second and third. Verdict for the plaintiff, motion for a new trial overruled, and judgment on the verdict.

On the trial, *Wood*, the assignee of *Nathan Lister*, was called as a witness for the defendant, by whom he was asked to state what was the consideration for which said promissory note was given. The witness was thereupon informed by the Court, that if the consideration of the note was small bills, issued by himself for the purpose of being used as a circulating medium, and as a substitute for small bank notes, as alleged in defendant's plea, and if by answering he would have to state matters that would subject him to a penalty, he was not bound to answer the question; and *Wood* thereupon refused to answer. To that opinion of the Court the defendant excepted.

The instruction of the Court to the witness was correct. The statute of *February* 24th, 1840, (Acts of 1840, p. 27), prohibits the circulating and issuing of small bills made by individuals, companies, or corporations in this State, and provides that any individual, &c., who shall issue or cause to be issued any such small bill, for the purpose of passing the same as a circulating medium, or as a substitute for small bank notes, shall for each offense forfeit and pay double the amount of each bill so issued, to be recovered by action of debt in the name of the State of *Indiana* against such individual, &c. A witness is not bound to answer any question, if his answer will expose him to criminal punishment or a penal liability. 1 Stark. Ev., 191; *Dandridge v. Corden*, 3 Carr. & Payne,

[*441] *11; *Roberts v. Allatt*, 1 Mood. & M., 192; *Cates v. Hardacre*, 3 Taunt., 424.

The defendant then introduced a witness to prove admissions made by *Wood* after he had indorsed the note to *Cain*, that he (*Wood*) knew at the time of making said note, that it was given by defendant in consideration of said small bills, issued by *Wood* to be used as mentioned above, but the Court would not allow the testimony. The defendant excepted to that opinion also. The Court did right in rejecting the testimony. The admissions of *Wood*, made after he had assigned the note, can not be received to prejudice his assignee. *Pocock v. Billing*, 2 Bing., 269; *Frear v. Evertson*, 20 J. R., 142.

The next error complained of was the refusal of the Court to grant a new trial. The ground of the motion of the defendant was, that he was surprised at the trial by the refusal of *John Wood* to testify, &c. The defendant's motion was supported by his own affidavit and the affidavit of *Wood*. The latter in his affidavit stated, that he would have given evidence of the facts of the case on the trial, but that he understood the Court to say that by doing so, he would inculcate himself in a moral point of view, and for that reason only, and not for fear of any legal liability, he declined answering; that he was advised that he had misunderstood the Court; and that he would, if a new trial were granted, give his evidence on such trial, and state that the sole consideration for the note sued on was as stated in defendant's second plea, &c. The defendant in his own affidavit states that, previously to the trial, *Wood* assured him he would swear on the trial, that the consideration of the note sued on was as is set forth in the second plea; and that he was surprised by *Wood's* refusing to swear as he had promised.

The motion was correctly overruled. If a new trial had been granted, *Wood* might again have refused to testify, and the Court would possess no power to compel him. It would be a vain act in the Court to order a new trial, on the promise of a witness to disclose facts that would subject him to a penalty, when it was known that he might or might not disclose them as he pleased. Courts do not lend a very willing ear to

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motions for new trials, and never entertain them unless [*442] *injustice has been done, and there be probable evidence that the merits will be more fully tried on a reinvestigation of the case.

The defendant still insists that the judgment should be reversed, because there was no evidence offered to the jury of the note mentioned in the first count, nor of the assignment to the plaintiff. It seems to us, however, that there was proof both of the note and the assignment.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

W. W. Wick and *L. Barbour*, for the plaintiff.

C. Fletcher, *O. Butler*, and *S. Yandes*, for the defendant.

GRADY and Another v. NEWBY.

TROVER.—A constable levied an execution on a mare which was claimed by a third person; and on a trial of the right of property the claimant succeeded. During the pendency of the trial, the constable delivered the mare to *A* and *B*, one of whom was the execution-plaintiff, they agreeing in writing to return the mare to the constable, or pay him \$35.50, should the claimant succeed. After the trial, *A* and *B* tendered to the constable \$35.50 which he refused, but they would not return the mare. *Held*, that the constable could not maintain trover against *A* and *B* for the mare.

SAME.—Trover can not be sustained unless the plaintiff have a property in the goods and a right to their possession.

ERROR to the *Posey* Circuit Court.

SULLIVAN, J.—Trover by *Newby* against the plaintiffs in error. Plea, the general issue. The parties made an agreed case which was submitted to the Court for decision. The facts as stated in the agreement were as follows: *Newby*, who was a constable of *Posey* county, having an execution against the goods and chattles of one *John Corwin*, levied it on a mare as the property of *Corwin*. The mare was claimed by one *Kin-*

cheloe, and the right of property was tried and found to be in *Kincheloe*. During the pendency of the trial, *Newby* put the mare into the possession of the plaintiffs in error, one of whom was the plaintiff in the execution against the goods [*443] and chattels of *Corwin*, and took from them an *instrument of writing, by which they bound themselves to return the mare to *Newby* if, upon the trial of the right of property, it should be decided that she belonged to *Kincheloe*, or on failure to return, to pay him \$35.50. After the trial of the right of property, the plaintiffs in error tendered to *Newby* \$35.50, but would not return the mare. *Newby* refused the money and brought this action. On the foregoing facts, the Court gave judgment for the plaintiff below.

Newby acquired possession of the property originally by a wrongful act. On an execution against the goods and chattels of *Corwin*, he seized the property of *Kincheloe*. He was a trespasser, and acquired no right to the property seized. The rightful owner claimed his property, and its restoration was adjudged to him.

If, however, it be admitted that *Newby* acquired a special property in the mare by virtue of the levy, that right of property ceased so soon as it was determined that the mare belonged to *Kincheloe*. *Walpole v. Smith*, 4 Blackf., 304. From that moment, he had neither a right of property nor of possession; and to maintain trover he must have both. *Pyne v. Dor*, 1 T. R., 55; *Gordon v. Harper*, 7 T. R., 9; *Pain v. Whittaker*, R. & Moody, 99; *Philips v. Robinson*, 4 Bing., 106.

The plaintiffs in error were liable to *Kincheloe* for the mare or her value, and a judgment against them in favour of *Newby*, or a payment by them of the \$35.50 to *Newby* according to their agreement with him, would not have released them from that liability.

We are therefore of opinion that, upon the facts disclosed, *Newby* has no remedy against the plaintiffs in error in this form of action. If *Kincheloe* had sued *Newby* and recovered from him the value of the mare, the case might have presented a different aspect.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Lockhart and *A. Clark* for the plaintiffs.

J. Pitcher, for the defendant.

[*444] *THE STATE, on the Relation of THE BOARD OF COMMISSIONERS, &c., v. HEROD.

ASSIGNEE OF JUDGMENT.—The assignor of a judgment has no control of it, nor of an execution on it taken out by the assignee; and if the sheriff, with notice of the assignment, fail to discharge his duty relative to such execution, by order of the assignor, he is liable to a suit therefor for the use of the assignee.

LIABILITY OF SHERIFF.—A sheriff who seizes property by virtue of a *per fieri facias*, and does not sell the same within a reasonable time, is liable for his non-feasance to the party injured, unless he have a legal excuse.(a)

ERROR to the *Bartholomew* Circuit Court.

SULLIVAN, J.—Case against the defendant as sheriff of *Bartholomew* county. The declaration contains two counts. The first charges that, on, &c., a certain writ of execution commonly called a *fi. fa.* came to the hands of the defendant against the goods and chattels, lands and tenements, of *J. Ruddick* and *J. Ruddick, jun.*, by virtue of which he levied on a certain lot in the town of *Columbus*, the property of *J. Ruddick*; that having so levied he did, afterwards, &c., fraudulently and purposely abandon said levy, and failed to advertise and offer for sale the said land, and wholly failed to make, levy, or satisfy the debt, &c., for which the same issued. By means whereof the plaintiff has been deprived of the means of collecting said debt. The second count is similar to the first, with the addition that it charges the defendant with failing to return the execution. Plea, the general issue, with leave to give the special matter in evidence.

It appeared in evidence that the State of *Indiana*, on the re-

(a) *The State v. Jones*, 4 Ind., 351.

The State, on the Relation of the Board of Commissioners, &c., v. Herod.

lation of *Deitz*, treasurer of *Bartholomew* county, had recovered a judgment against *J. Ruddick* and *J. Ruddick, jun.*, for the sum of \$847, which had been assigned by the board of commissioners of the county to one *Elder*, and by *Elder* to *A. and C. Jones*, and that a *feri facias* was issued on said judgment by the direction of *A. and C. Jones*, and delivered to the defendant, sheriff of *Bartholomew* county, by virtue of which he levied on a lot in the town of *Columbus*, the property of *J. Ruddick*. After the rendition of the judgment, and while the execution was in the hands of the defendant, *J. Ruddick, jun.*,

one of the execution-debtors, became the treasurer of

- [*445] the county, and as such treasurer directed *the defendant to return the execution. The sheriff thereupon returned the writ, indorsed "Returned by order of the treasurer of the county," &c. It was admitted that the defendant and *Ruddick* had notice of the transfer of the judgment by the Board of Commissioners to *Elder*, and that *Elder* had transferred it to *A. and C. Jones*, for whose benefit the execution had issued, and for whose use this suit was prosecuted.

On the foregoing facts, the Court, who tried the cause, gave judgment for the defendant.

We think the Court mistook the law of this case. The Board of Commissioners having transferred the judgment, the county had no further control over it, nor the execution that issued upon it. The control of it belonged to the assignees; and the sheriff, in obeying the directions of *Ruddick*, was guilty of a palpable violation of duty. A sheriff who seizes property by virtue of a *feri facias*, and does not sell within a reasonable time, is liable for his non-feasance to the party injured, unless he has an excuse known to the law. It will not certainly be contended that a neglect to sell at the request of one who has no other interest in the execution than to defeat it, is such an excuse.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick and *L. Barbour*, for the plaintiff.

A. A. Hammond, for the defendant.

Mahan v. Power.

MAHAN v. POWER.

JUSTICE'S JUDGMENT—TRANSCRIPT.—A plea to a *scire facias* on a justice's transcript for execution against real estate, that it was not made known to the justice that the defendant had such estate, is bad on general demurrer. SAME—EVIDENCE.—The order book of the Circuit Court is evidence of the record of such transcript in that Court, but not of the execution and its return described in the *scire facias*.

ERROR to the *Rush* Circuit Court.

DEWEY, J.—*Scire facias* on a transcript of a justice's judgment, &c., for execution against real estate. The writ [*446] alleges *that a transcript of the proceedings before the justice, including a statement of the issuing of an execution and a return thereof of "no goods found," duly certified, was filed and recorded in the Circuit Court. Pleas: 1, "There was no such record of the said supposed recovery and proceedings as in said *scire facias* is alleged." 2, "No execution against the goods and chattels of the defendant was issued upon the judgment specified in said *scire facias*, and returned 'no property found,' as in said *scire facias* is alleged." 3, "The said supposed transcript in said *scire facias* described was not made out, certified, filed, and recorded in manner and form," &c. 4, "It was not made known to the justice that said defendant had lands and tenements." There were issues upon the three first pleas. A general demurrer to the fourth was correctly sustained. Trial by the Court, and judgment for the plaintiff.

The plaintiff produced the order book of the Circuit Court to prove the transcript of the justice's judgment, and proceedings, as set forth in the *scire facias*; the defendant objected to its admissibility, but the objection was overruled, and the evidence received. We think there was no error in this. The first and third pleas put in issue the existence of a duly certified transcript of the justice's judgment, and also its being filed and recorded in the clerk's office. The statute authorizes transcripts of justices' judgments to be entered on the order

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book of the Circuit Courts. R. S., 1838, p. 135. This renders the transcripts a matter of record in that Court; and the order book is competent evidence of such record.

The second plea denies the existence of the execution and of its return, which the *scire facias* alleges were certified by the justice of the peace. No other evidence of the execution and return was given except the order book of the Circuit Court. As the statute does not authorize the justice's certificate of the issuing of the execution and of its return to be recorded in the Circuit Court, the order book was not competent evidence to establish the execution and return. And we have decided at this term, in the case of *Henkle v. German*, that when the existence of the execution is denied by plea, the original, or a certified or sworn copy must be produced. The plaintiff, therefore, did not sustain the issue *on the second plea, and the Court erred in rendering judgment in his favour.

Per Curiam.---The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

G. B. Tingley, for the defendant.

KING v. STRAIN.

SUNDAY.—A debtor legally arrested on *Sunday* by virtue of an execution procured on that day, may obtain his discharge on *the same day* under the execution-law.

ERROR to the *Vigo* Circuit Court.

DEWEY, J.—Debt against a sheriff for suffering an escape from arrest on an execution. Pleas, the general issue; and two special pleas, both held good on general demurrer. Judgment for the defendant.

One of the special pleas shows that the execution on which the arrest took place was issued on *Sunday*, the proper affidavit

having been made; that the arrest was made on the same day; and that the execution-debtor also on that day, procured a discharge from the custody of the defendant, by complying with the act subjecting real and personal estate to execution.

The only material question raised by the plea is, was it legal for the execution-debtor to procure his discharge on *Sunday*, from an arrest which had taken place on that day under an execution then issued?

The issuing of the execution and the arrest were authorized by the law of this State, the execution-creditor having filed the requisite affidavit in the clerk's office, whence the execution issued. R. S., 1838, pp. 462, 376. The execution-law enacts, that any execution-debtor under arrest may discharge himself from custody by taking the steps prescribed by the statute. Rev. Stat., 1838, pp. 281, 282. The plea in question shows that these steps were taken. But it is contended that this last act, having passed before those

authorizing the issuing of the execution and the
 [*448] arrest on *Sunday*, and *conferring no authority to act on that day, does not sanction the discharge set up in the plea, which was a discharge procured on the *Sabbath*. We do not take this view of the subject. We think the privilege of regaining personal liberty, on the terms prescribed by the statute (which is indeed a right secured by the constitution), should be coeval with the power of imprisonment; and as this power, under certain circumstances, may be exercised on the *Sabbath*, so, we think, may the constitutional and statutory remedy be applied on the same day.

The plea is a good bar, and the Circuit Court committed no error in rendering judgment for the defendant.

Per Curiam.—The judgment is affirmed with costs.

C. W. Barbour, for the plaintiff.

A. Kinney and S. B. Gookins, for the defendant.

WHITE and Others v. WILSON and Another.

MORTGAGE—MISTAKE.—*A* mortgaged certain lands to *B* to secure him against loss as indorser of his (*A*'s) note. A tract of land, intended by the parties to be inserted in the mortgage, was omitted by mistake. Afterwards, certain creditors of *A* obtained judgments against him. *B* paid the indorsed note which was for a larger amount than the mortgaged lands and the omitted tract were worth; and *A* was insolvent. *Held*, that a Court of chancery might correct the mistake in the mortgage, and free the omitted tract from the lien of the judgments.(a)

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—*Wilson* and another filed a bill in chancery against *White* and others. The object of the bill was to have a mistake in a mortgage, which had been executed by one of the defendants to the complainants, corrected by the insertion in the mortgage of a certain tract of land which, by mistake, had been omitted, and also to secure the land so omitted from being liable to certain judgments against the mortgagor. The Circuit Court, on the bill, answers, depositions, &c., rendered a decree correcting the mistake, and freeing the land omitted in the mortgage from the lien of the judgments.

[*449] *The facts necessary to be noticed in this case are as follows: *Hunt*, one of the defendants, mortgaged certain lands to the complainants, in order to secure them against loss as his indorsers of a promissory note. A tract of land, intended by the parties to be included in the mortgage, was omitted by mistake. Subsequently to the mortgage, and before the bill was filed, certain creditors of *Hunt* obtained judgments against him; and the complainants had reason to apprehend that executions on the judgments would be levied on the land, which, by mistake, had been omitted in the mortgage. The complainants had paid the note, which was for a larger amount than the mortgaged lands and the tract omitted were worth; and *Hunt* was insolvent.

We think the decree is right. The Court had authority to

(a) *Sample v. Rowe*, 24 Ind., 208.

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correct the mistake. Mitford's Ch. Pl., 184; *Gillespie v. Moon*, 2 Johns. Ch. Rep., 585. And the land omitted in the mortgage, the mistake being corrected, was not subject to the judgments. It is said by Judge Story, that, in all cases of mistake in written instruments, Courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment-creditors, or purchasers from them with notice of the facts. 1 Story's Eq., 178. See, also, *Burgh v. Francis*, 1 Eq. Cas. Abr., 320; *Taylor v. Wheeler*, 2 Vernon, 564; *Finch v. The Earl of Winchelsea*, 1 P. Williams, 277; *In the matter of Howe*, 1 Paige, 125.

Per Curiam.—The decree is affirmed, with costs.

R. A. Lockwood, for the plaintiffs.

G. S. Orth, for the defendants.

MERRIMAN v. THE STATE.

USURY—EVIDENCE.—In support of an indictment for usury charging the loan to have been for three months, evidence of a loan for three months and one month in addition thereto if the borrower wished it, is inadmissible on the ground of variance.

[*450] *ERROR to the La Grange Circuit Court.

BLACKFORD, J.—This was an indictment for usury consisting of four counts. The cause was tried by the Court. Judgment for the State on the second count, and for the defendant on the others.

The second count alleges that the defendant, on the first of January, 1841, at, &c., lent to one William Fox the sum of \$30.00 for the term of three months; and that the defendant did then and there unlawfully demand and receive from said Fox four tons of hay, of the value of \$16.00, for said loan of \$30.00 for said term of three months.

The State offered to prove on the trial, that in January,

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1841, the defendant made a loan to *Fox* of \$30.00 for three months from that time, *and one month in addition thereto if he wished*, and that for the use of said money as aforesaid, *Fox* was to deliver and did deliver to the defendant four tons of hay, which hay was worth \$4.00 a ton. The defendant objected to this evidence, but the objection was overruled.

We think the evidence was objectionable on the ground of variance. According to the second count, the loan was for three months; but according to the evidence, it was for three months, and one month in addition thereto if the borrower wished it. That was a fatal variance. *Tate v. Wellings*, 3 T. R., 531.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. B. Howe, for the plaintiff.

W. H. Coombs, for the State.

DANIELS v. STONE.

VENDOR AND PURCHASER.—A note payable one day after date was given for the price of certain town lots, the title for which was to be made by the plaintiff to the defendant on payment of the purchase-money, *and a demand of the deed*. *Held*, that it was no defense to a suit on the note, that the deed had not been made or offered before the suit was commenced. *Held*, also, that it was no defense to such suit that, at the time of the sale, the
 [*451] plaintiff represented to the defendant that there was an alley on one side of the lots, and that the plaintiff had since conveyed to a third person the land adjoining the lots and embracing the alley, if the plaintiff's plat of the lots, on which the alley was designated, was recorded before the execution of the conveyance. *Held*, also, that had such conveyance been material in the cause, the record of it would have been admissible evidence for the defendant, without accounting for the absence of the original.(a)

ERROR to the *Fayette* Circuit Court.

BLACKFORD, J.—Two actions of debt were brought by

(a) *Mix v. Ellsworth*, 5 Ind., 517.

Daniels v. Stone

Stone against *Daniels* before a justice of the peace. One of the suits was on a sealed note for the payment, one day after date, of \$86.00; and the other, on a note for \$14.00, payable one day after date. The justice gave judgment in each case for the plaintiff; and the defendant appealed. In the Circuit Court, the plaintiff obtained judgment for the amount due on the notes.

One defense made to the suits was, that the notes sued on were given in consideration of two lots of land, for which the plaintiff was to make the defendant a title so soon as full payment should be made and the deed demanded; and that no conveyance of the lots had been made, or offered to be made, before the commencement of either of the suits. This defense was insufficient. The plaintiff had a right to sue on the notes after they became due, without having made, or offered to make on receiving the purchase-money at the same time, a deed for the lots, unless the deed had been demanded.

Another defense was, that the plaintiff, at the time of the sale, represented to the defendant that there was an alley on one side of the lots; and that the plaintiff had since conveyed to a third person the land adjoining the lots and embracing the alley. In support of this defense, the defendant proved the representation as to the alley, and that there was on record the plaintiff's plat of the lots, showing the existence of the alley. He then offered in evidence the record, in the recorder's office, of a deed to a third person for the land adjoining the lots and embracing the alley, without accounting for the absence of the original deed. This evidence was objected to and the objection sustained.

The record of the deed in this case was, according to what is said in *Bowser v. Warren*, 4 Blackf., 522, admissible [*452] evidence, if it was material in the cause. But it could not be material, if made subsequently to the recording of the plat on which, according to the defendant's evidence, the alley was designated, because it could not, in that case, vacate the alley. And as the record of the cause does not inform us when the conveyance in question was made, we

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must presume, in favour of the opinion of the Court, that it was not made until after the plat was recorded.

The judgment is objected to because the Court consolidated the suits; but there is no ground for this objection.

Per Curiam.—The judgment is affirmed with 5 *per cent.* damages and costs.

C. B. Smith, for the plaintiff.

C. H. Test, for the defendant.

BOWEN and Another v. GRESHAM.

IMPRISONMENT FOR DEBT.—If in a suit on a bond for the prison-limits, the alleged breach be an escape before the passage of the act of 1842 abolishing imprisonment for debt, a plea relying on that act is bad.

SAME.—The declaration in such suit described the judgment under which the imprisonment took place as of a certain date and amount, and averred that the judgment was erroneously recited in the condition of the bond as of a different date and amount (setting them out.) *Held*, that the declaration was bad on general demurrer. *Held*, also, that such mistake in the recital in the condition of the bond might be corrected by a Court of chancery. *Held*, also, that the declaration in a suit on the bond might describe the condition without noticing the mistake in the recital, and the defendant would be estopped from showing the judgment to be different from that recited.

APPEAL from the Carroll Circuit Court.

BLACKFORD, J.—This was an action of debt against one *Hamilton* and the appellee, *Gresham*. The writ was returned served on *Gresham*, and not found as to *Hamilton*.

A declaration states that on the 25th of *June*, 1840, the plaintiffs recovered judgment against *Hamilton* for the sum of \$84.18 debt, and \$4.80 damages, before a certain justice of the peace, with costs; that a *fiery facias* issued on the [*453] judgment *and was returned “no property found:” that a *capias ad satisfaciendum* afterwards issued on the judgment, under which *Hamilton* was committed to jail and that *Hamilton* and *Gresham* executed their bond to the

plaintiffs in the penal sum of \$176, conditioned that whereas *Hamilton* had, on the 9th of *October*, 1840, been arrested and committed to jail by virtue of the said *capias ad satisfaciendum* issued on the said judgment, now if he should continue within the prison-limits, &c., the bond to be void. The declaration also states, that the judgment of the justice is erroneously recited in the condition of the bond as having been rendered on the 21st of *June*, 1840; when, in fact, it was rendered on the 25th of *June*, 1840, and as being for \$84.18 with costs, when, in fact, it was for \$84.18 debt and \$4.80 damages, with costs. The following breach among others is assigned, to wit, that *Hamilton* did not continue within the prison-limits, but, on the 15th of *October*, 1841, escaped therefrom, &c.

The defendant pleaded, *inter alia*, that, on the 13th of *January*, 1842, a statute was passed enacting that all persons then confined within any prison or prison-limits, &c., were thereby discharged.

General demurrer to this plea, and judgment for the defendant.

The plea is bad, because the escape, as alleged in the declaration, occurred before the passage of the statute relied on by the plea.

The judgment for the defendant, however, is right, on the ground that the declaration is insufficient on general demurrer. The declaration states the judgment of the justice to have been rendered on the 25th of *June*, 1840, and to be for \$84.18 debt, and \$4.80 damages, with costs. It also states that, according to the condition of the bond, the judgment was rendered on the 21st of *June*, 1840, and for \$84.18 with costs. This is a fatal variance. The declaration attempts to avoid this objection, by averring the judgment to have been erroneously described in the condition of the bond, &c.; but such an

averment is inadmissible, because, were it allowed, [*454] parol testimony must be admitted to prove it, and thus the face of the condition of the bond would be contradicted by parol evidence, which the law does not permit.

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If the averment be true, the mistake may be corrected by a Court of chancery. *Lindley v. Cravens*, 2 Blackf., 426. In a late *English* case, the Vice Chancellor uses the following language: "The rule at law, that evidence is not admissible to contradict or explain a written instrument, stated, *simpliciter*, is received in equity as well as at law. A Court of equity does, nevertheless, assume a jurisdiction to reform instruments, which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. And, of necessity, in the exercise of this jurisdiction, a Court of equity receives evidence of the true agreement in contradiction of the written instrument." *Ball v. Storie*, 1 Sim. & Stuart, 210.

There is, to be sure, another course for the plaintiffs, if the condition of the bond be as they state it in the declaration. They may sue on the bond, describing the condition without noticing the mistake, and the defendants will be estopped from showing the judgment to be different from that recited in the condition. *Love v. Kidwell*, 4 Blackf., 553.

Per Curiam.—The judgment is affirmed with costs.

A. L. Robinson, for the appellants.

J. Pettit, for the appellee.

 EZRA v. MANLOVE.

JURISDICTION OF JUSTICES—DISTRESS FOR RENT.—The jurisdiction of a justice of the peace, under the act regulating distress for rent, is not limited to any amount.

SAME.—The justice may take bail for the stay of execution on a judgment rendered for any amount against the tenant in such case, and issue a *scire facias* against the bail as in other cases.

APPEAL—BOND—PRACTICE.—An appeal-bond taken in the case of an appeal to the Circuit Court from a justice's judgment, and not objected to in the Circuit Court, can not be objected to in the Supreme Court.

SAME.—No objection to such bond can authorize the dismissal of the action by the Circuit Court.

Ezra v. Manlove.

[*455] *ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was a *scire facias* issued by a justice of the peace in favour of *Ezra* against *Manlove* as replevin bail. The *scire facias* states that on, &c., a distress-warrant for rent had been issued by the justice in favour of *Ezra* and, on his affidavit, against one *Sumner*; that the latter, according to the statute, appeared before the justice and confessed judgment for the sum of \$293, the rent due; that *Manlove* entered himself as bail for the stay of execution; and that an execution had issued on the judgment against *Sumner*, and been returned “no property found.” The parties to the *scire facias* appeared before the justice, and the cause was submitted to a jury. Verdict and judgment for the defendant. The plaintiff appealed.

The Circuit Court dismissed the cause, on the defendant’s motion, for the want of jurisdiction.

The defendant in error contends that the jurisdiction of a justice of the peace does not extend, even in cases of confessed judgments, beyond \$100; that the judgment against *Sumner* being for more than that sum was a nullity; and that the bail for the stay of execution on such judgment is not therefore liable.

It is true that the statute regulating the jurisdiction and duties of justices of the peace limits the jurisdiction of those officers, in all cases to which it applies, as the defendant in error contends. R. S., 1838, p. 364. But the proceeding against *Sumner* was under the statute regulating distress for rent, which enacts that a landlord’s warrant for rent due may be issued by a justice of the peace, and that in all such cases, the tenant may have the property taken by virtue of the warrant discharged, by confessing judgment before a justice of the peace for the amount of the rent due, &c. R. S., 1838, p. 472. In the statute last-named there is no limit as to the amount of the justice’s jurisdiction; and the cases arising under it stand, as we conceive, independent of the statute regulating the jurisdiction and duties of justices of the peace.

The justice having jurisdiction to render the judgment

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against *Sumner*, it follows, there being nothing in the statute to the contrary, that he had authority to take bail for [*456] the *stay of execution on it, and, after the proper return to an execution against the principal, to issue a *scire facias* against the bail, as in other cases.

It is said that the suit was, at any rate, rightly dismissed on account of a defect in the appeal bond. The objection to the bond is that it is in the penalty of "two hundred," the word dollars being omitted. This objection was not made in the Circuit Court, and, therefore, were it otherwise tenable, it comes too late. Besides, no objection whatever to the appeal bond could be a ground for dismissing the action.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Jenners and *R. A. Chandler*, for the plaintiff.

Z. Baird and *R. A. Lockwood*, for the defendant.

ORPUT v. HARDY and Another.

SCIRE FACIAS—AMENDMENT—CONTINUANCE.—A *scire facias* against *A* to have execution against real estate on a justice's transcript of a judgment against him and *B*, without alleging such previous proceedings as authorized the suit against *A* alone, is bad in substance. And an amendment of the *scire facias*, by alleging such previous proceedings, entitles the defendant to a continuance.

SAME—VARIANCE.—The said *scire facias* averred the judgment mentioned in the justice's transcript to be for \$69.15, with costs. The transcript offered in evidence was of a judgment for \$60.44, with the interest that had accrued, and costs. Held, that there was no substantial variance, it appearing on calculation that the amount due by the judgment mentioned in the transcript was correctly stated in the *scire facias*.

ERROR to the Wayne Circuit Court.

SULLIVAN, J.—*Scire facias* on the transcript of a justice's judgment to sell real estate. The *scire facias* recited, substantially, that *Hardy* and *Layman* on, &c., obtained a judgment before a justice of the peace against *Orput*, the plaintiff in

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error, and one *James Swim* for the sum of \$69.15, with costs, &c.; that an execution against the goods and chattels of the defendants had been issued by the justice and returned *nulla bona*; and that a transcript, &c., had been filed in the Circuit Court; that afterwards a *sci. fa.* had issued from the [*457] *Wayne* Circuit Court on said *transcript against the defendants, which was returned "not found" as to *Orput*. The writ then commanded the sheriff to summon said *Orput* to appear and show cause, &c. At a subsequent term, the plaintiffs asked and obtained leave to amend the *sci. fa.* so as to show that on the previous writ there was a return of *scire feci* as to *Swim*, and to amend further by inserting the following words, viz., "And afterwards, to wit, on the ——— judicial day of the *March* term, 1842, of the *Wayne* Circuit Court, on a suggestion of "not found" as to said *Orput*, a judgment was rendered against said *Swim* on the said *scire facias*." The defendant thereupon moved the Court to continue the cause, which motion was refused. He then pleaded, 1, Payment; 2, *Nul tiel record*; 3, No such execution, &c. There was also a fourth plea, which was abandoned by the defendant. Replications to the pleas; demurrer to the replication to the third plea correctly overruled. The cause was then submitted to the Court for trial, and judgment for the plaintiffs.

It is manifest that the *scire facias*, without the amendment, was substantially defective. It showed a demand against two, jointly liable, and the proceeding was against one only. It omitted to show such a return as to *Swim*, or that such proceedings were had against him, as to authorize this further proceeding against *Orput*. R. S., 1838, p. 446. Without the amendment, therefore, the *scire facias* would have been bad on demurrer or writ of error. A *scire facias* in this proceeding is in the nature of a declaration, and where a declaration is amended in matter of substance, the defendant, if he claim it, is entitled to a continuance.

On the trial of the issue, the plaintiffs offered in evidence a transcript of a judgment from the justice's docket for "\$60.44, with the interest that had accrued and costs." The defendant

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objected to the evidence, but the Court received it, and the defendant excepted. We find by calculation, that the amount of the judgment in the transcript is accurately computed in the *scire facias*. The variance is in words only and not in substance, and the Court therefore did not err in admitting the testimony. But as the Court erred in refusing to continue the cause, the judgment must be reversed.

[*458] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Julian and *J. S. Newman*, for the plaintiff.

C. H. Test, for the defendants.

BURROWS and Another v. YOUNT.

PLEADING.—A plea, if ambiguous, must be taken most strongly against the pleader.

VENDOR AND PURCHASER—TENDER OF DEED.—If a person sell real estate to be afterwards paid for, and contract to make a title to the purchaser on payment of all the purchase-money, it is not necessary to a recovery in a suit on a note for part of the purchase-money (the residue having been paid), that a deed be executed or unconditionally tendered before the commencement of the suit.^(a)

SAME.—If a deed in such case be offered when the note falls due, or within a reasonable time afterwards, on payment of the note being made at the time of delivering the deed, the suit may be brought.

ERROR to the *Fountain* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the plaintiffs in error against *Yount*. The suit is founded on a sealed note, dated the 8th of *January*, 1840, for the payment of \$1,000 on or before the 25th of *December*, 1841. The note was payable to *Miller*, and by him indorsed to *Evans*, who indorsed it to the plaintiffs.

There was a plea to the following effect: That the defendant purchased of the payee of the note certain lots of ground

(a) *Mix v. Ellsworth*, 5 Ind., 517.

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for the price of \$3,000, and received, at the time of the purchase, a bond from the latter, conditioned to make the defendant a good title for the lots upon payment of all the purchase money; that the note sued on was given in part consideration of said purchase; that the other part of the purchase-money had been paid; that the defendant had always been, and still was, ready to receive a deed for the lots and pay what remained due of the price, when the deed should be made or tendered; but that the payee had not made or tendered the deed as stipulated in the title-bond or otherwise.

General demurrer to the plea, and judgment for the defendant.

[*459] *We understand that, by this plea, the defendant relies on the fact, that the deed for the lots had not, before the commencement of the suit, been made or unconditionally tendered to him. There is some ambiguity in the plea, arising from the words "as stipulated in the title-bond or otherwise;" but as a plea, if ambiguous, is to be taken most strongly against the pleader, this plea must be considered to mean what we have stated; and viewed in that light, it is evidently bad.

According to the contract as stated in the plea, the purchaser having paid the purchase-money, except the part for which the note sued on was given, could have entitled himself to a good title for the lots, by paying that note when it became due, or by offering to pay it to the holders at the time it became due, on condition of receiving, at the time of the payment, the vendor's conveyance of the lots. And if the note was not paid when due, the holders had a right to sue on it, if the vendor, previously to the commencement of the suit, had made the purchaser a good title to the lots; or if, on the day the note fell due, or within a reasonable time afterwards, the holders had offered to the purchaser a good title to the lots, executed by the vendor, provided the purchaser would, at the time of his receiving the deed, pay the note. *Owen v. Norris*, 5 Blackf., 479. But the purchaser had no right to insist that he was not bound to pay the note, because the deed had not

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been made, or unconditionally tendered to him, before the suit was commenced.

We are, therefore, of opinion that the plea before us is defective, for omitting to aver that the plaintiffs had not, on the day the note became due, or within a reasonable time afterwards, offered to deliver to the defendant a good title for the land executed by the vendor, upon their being paid, at the time of delivering the deed, the amount due on the note.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiffs.

J. Pettit, for the defendant.

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*THRASHER v. THE STATE.

HORSE-RACE—INDICTMENT.—An indictment charging that the defendant suffered his *mare* to be run in a certain race, &c., is not supported by evidence that the animal run was a *horse*.^(a)

ERROR to the *Rush* Circuit Court.

SULLIVAN, J.—The defendant was indicted for that, on, &c., he did unlawfully and knowingly suffer and permit his *mare* to be then and there run in a certain race commonly called a horse-race in and along a certain public highway, &c., contrary to the form of the statute, &c. Plea, not guilty. The cause, by consent of parties, was tried by the Court. Judgment against the defendant.

The proof was, that the animal run was a *horse* and not a *mare*. The only question is whether the variance was material.

The statute enacts, "that any person who shall knowingly suffer his horse, mare, or gelding, to be run in what is commonly called a 'horse-race' along any public highway in this State, on being convicted, &c., shall be fined," &c. We feel constrained by the weight of authority to say, that the testi-

(a) *Conway v. The State*, 4 Ind., 94.

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mony does not support the charge in the indictment. The averment in the indictment as to the kind of animal that was suffered to be run is descriptive, and must be proved as laid. The authorities are too numerous, and have been too long acquiesced in, to be disturbed. *Rex v. Chalkley*, R. & R., 258; *Rex v. Beaney*, Ib., 416; *Loom's case*, 1 Moody's C. C., 160.(1)
Per Curiam.—The judgment is reversed. Cause remanded, &c.

G. B. Tingley, for the plaintiff.

H. O'Neal, for the State.

(1)An indictment for stealing a cow can not be sustained by evidence of stealing a heifer, as the statute mentions cows and heifers. *Cook's case*, 2 East's Cr. Law, 616. So, on an indictment for stealing sheep, a prisoner can not be convicted for stealing lambs, the statute specifying lambs as well as sheep. *Loom's case*, cited in the text.

[*461] *JACKSON and Others v. THE STATE.

JURY.—A verdict in a criminal case for the State. found by a jury consisting of eleven men, is erroneous.(a)

ERROR to the *Dearborn* Circuit Court.

SULLIVAN, J.—The plaintiffs in error were indicted for a riot. Plea, not guilty. Verdict of guilty, and judgment on the verdict.

This judgment must be reversed. It appears from the transcript of the record, that the jury that tried the cause was composed of eleven men only, and not twelve as the law requires. This is a fatal defect on writ of error. 1 Chitt. Cr. Law, 505.

Per Curiam.—The judgment is reversed. Cause remanded for another trial.

A. Lane, for the plaintiffs.

J. Dumont, for the State.

(a) *Brown v. The State*, 16 Ind., 496.

 Andrew and Others v. Parker.

ANDREW and Others v. PARKER.

CONSTABLE—FALSE RETURN.—In a *scire facias* against a constable for a false return of an execution—the return being that the execution was returned by order of the plaintiff—the return is no evidence that the plaintiff gave such order.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—This was a *scire facias* issued by a justice of the peace against a constable for a false return of an execution. The writ, after stating that the plaintiffs in error had recovered a judgment against certain persons before the justice, the issuing of a *ca. sa.* thereon, the placing the same in the hands of the defendant in error, a constable, to be executed, and his disobedience of the precept of the writ, alleges that he made a false return of the execution, “in this, to wit, that the same had been returned by the order of the plaintiffs therein named, when in truth and in fact, the said plaintiffs never did order said writ to be returned.” The defendant pleaded, “that the return made by him on said *capias ad satisfaciendum* was not false, as alleged in said *scire facias*,” &c. The cause [*462] was appealed. It was submitted to the *Circuit Court for trial without evidence, under an agreement that judgment should be rendered against that party on whom devolved the burthen of proof. The Court rendered judgment in favour of the defendant.

We conceive the issue formed by the pleadings to be, whether the plaintiffs in execution did, or did not, direct the constable to return the writ; and that the affirmative was with him. On him, consequently, was the burthen of proof. But the real question on which the decision of the cause must turn is, can the constable avail himself of his own return to support the issue on his part? That the returns of sworn officers are, in actions by or against them, *prima facie* evidence of their official acts, may be true. Such was held to be the law in *Bruce v. Holden*, 21 Pick., 187. If the rule were not so, it would sometimes be impossible for officers to establish such

acts. But the fact proposed to be proved by the return in the present instance—the direction of the execution-plaintiffs to the constable—was not an official act; nor was it of such a character that the safety of the officer required that it should be proved by his return. As he relied upon it as an excuse for not executing the writ, and as he could easily have furnished himself with other proof of its existence, had he seen fit, we think he was bound to do so. It would be dangerous to permit an officer to screen himself from responsibility for neglect of duty, by simply making a return that he acted under the direction of the injured party. And if such a return is to be evidence, even *prima facie*, of that fact, it would effectually screen the officer in most cases of neglect, for it would, generally, be utterly impossible to prove its falsity. But, with proper caution, the officer may be always prepared to show the existence of the alleged excuse if it exist.

It has been urged that the *scire facias* is insufficient. Such an objection, if it could at any time have been sustained, was waived by the manner in which this cause was submitted to the Court.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pettit, for the plaintiffs.

D. Mace, for the defendant.

[*463] *ARMSTRONG and Others v. MILLIGAN.

EXECUTION AGAINST DECEDENT'S REAL ESTATE.—To a petition for execution against real estate on a judgment against an administrator, a plea that the debtor did not die seised in fee-simple of the lands mentioned in the petition or of any part thereof, is good. And a plea in such case, that there were terre-tenants on the land who were in possession at the commencement of the suit, is also good. But a plea denying in general terms "each and every allegation in said petition contained," is bad, and may be rejected on motion.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—This was a petition by a creditor who had obtained a judgment against the administrator of his deceased debtor, praying for execution against certain lands of the decedent. The petition makes the administrator and heirs of the debtor parties, and avers that there were no terre-tenants of the lands against which execution was sought. It contains the averments required by the statute. Some of the defendants were infants, and by their guardian *ad litem* claimed the protection of the Court. The other defendants, among other pleas, pleaded the following: 1, "That the said debtor did not die seised in fee-simple of the lands in said petition mentioned, or any part thereof;" 2, "That there were terre-tenants on said lands, who were in possession of the same at the commencement of the suit;" 3, "The said defendants deny each and every allegation in said petition contained." These three pleas were rejected on the motion of the plaintiff. There was a trial on the other pleas, and a judgment of execution against the lands specified in the petition. The rejection of the pleas is the only error complained of.

The statute on which this proceeding is founded, requires that the petition should set out and describe the real estate of the decedent against which the creditor seeks execution. R. S., 1838, p. 284. This is done in the present case; and the averment is specifically denied by the first plea which was rejected. We think that plea constituted a good defense under the statute, and that it should not have been rejected.

The plea, that there were terre-tenants, but for the statute would be properly a plea in abatement. But we think the statute requires that terre-tenants, if there be any, should be made parties to the suit, or if there be none it should be so averred. *Williams et al. v. Morehouse et al.*, [464] May term, 1842. The second plea which was rejected was, therefore, correctly pleaded in bar. Perhaps it would have been bad on demurrer for not giving the names of the terre-tenants; but there was no cause for rejecting it.

The third plea was correctly rejected. It is entirely too

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general. Besides, it would involve in one issue matters of record, and matters *in pais*, entirely distinct from each other.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiffs.

Z. Baird, for the defendant.

Lines and Others v. THE STATE, on the Relation of JONES

ESCAPE—EVIDENCE—OFFICER'S RETURN.—In debt on a sheriff's bond the breach assigned was an escape on execution. *Held*, that it was too late, after the issue had been joined, the plaintiff's testimony closed, and a witness examined by the defendants, to permit the sheriff to amend his return to the execution. *Held*, also, that evidence for the defendants of the execution-debtor's insolvency at the time of his arrest and escape, was inadmissible. *Held*, also, that the defendants could not introduce parol evidence to contradict the sheriff's return. *Held*, also, that the measure of damages was the amount of the execution and costs.

ERROR to the *Fayette Circuit Court*.

BLACKFORD, J.—This was an action of debt by the State, on the relation of *Jones*, on a sheriff's bond in the penalty of \$5,000. *Lines* was the principal obligor, and the other defendants were his sureties. The condition of the bond, which was that *Lines*, the sheriff, should faithfully discharge his duties, &c., was set out in the declaration, and the following breach assigned, viz., that at, &c., the relator, *Jones*, obtained judgment against one *Williams* and one *Hamilton* for \$558.78, with costs; that a *capias ad satisfaciendum* issued against the judgment-defendants, and was delivered to the sheriff; that the sheriff, by virtue of the writ, arrested *Williams* and detained him until, on, &c., when he suffered him to escape, [*465] &c.; and that the money was unpaid, *&c. General demurrer to the declaration, and the demurrer correctly overruled. Plea, *nil debent*. Verdict for the plaintiff,

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and damages assessed at \$628. Judgment for the penalty of the bond, to be discharged by payment of the damages assessed.

On the trial after the plaintiff had introduced the execution and return in evidence, which return was as follows: "As within commanded I did, on the 9th of *July*, 1840, take into custody *Thomas Williams*, and had him at the clerk's office in *Connersville* in the evening of said day, when he escaped, &c. and by order of the plaintiff, *Jones*, I return this writ not served as to *Hamilton*. *Sept.* 21, 1840. *Thomas Lines*, Shff. *F. C.*;" and after the plaintiff's testimony was closed, and the defendants had examined one of their witnesses; the defendants suggested that the sheriff's return did not correspond with the facts, and asked leave for the sheriff to amend the return so as to make it correspond with the facts; but the leave was refused. There is no error in this refusal. The record does not show what the proposed amendment was, and we do not know, therefore, whether, had it been made, the case would have been materially altered; nor does it appear, that any affidavit was offered on which to found the motion. Besides, we think the offer to amend was made too late. Issue had not only been joined, but the plaintiff's testimony was closed, and the defendants had commenced the examination of their witnesses. There is an express authority for saying, that, at that stage of the cause, the amendment ought not to be made. *Scott v. Seiler*, 5 Watts, 235, cited in *Phill. Ev.*, part 2, p. 1096.

The defendants offered to prove that *Williams*, at the time of the arrest and escape, was notoriously insolvent; but the evidence was rejected. It has been decided in *Pennsylvania*, in a similar case, that such evidence is inadmissible; and we approve of that decision. The sheriff would have been liable in an action of debt for the escape for the amount of the debt with interest and costs, without regard to the debtor's insolvency; and it appears to us that he and his sureties must be equally liable for the escape, when sued on their bond conditioned for the faithful discharge of the sheriff's duties. See *Spader v. Frost*, 4 Blackf., 190.

 McCormick and Another v. McClure and Others.

[*466] *The defendants offered to prove by *parol*, that when *Williams* was arrested, the sheriff also, by virtue of the writ, arrested *Hamilton*, the other defendant, who was in custody when *Williams* escaped; and that after the escape, the relator, *Jones*, discharged *Hamilton* from the arrest. This testimony was correctly rejected, as it would have contradicted the sheriff's return, which could not be done. *Purrington v. Loring*, 7 Mass., 388; *Townsend v. Olin*, 5 Wend., 207.

The Court, on the plaintiff's motion, instructed the jury as follows: "If the plaintiff has given the bond named in the declaration in evidence, and has proved the recovery of the judgment, and issuing of the execution, and delivery of the same to *Lines*, the sheriff, and that he arrested *Williams*, one of the defendants in the execution, and suffered or permitted his escape, and made his return on the execution stating the arrest of *Williams*, his escape, and that he had not served the execution on *Hamilton*, the other defendant, by the plaintiff's order,—the measure of damages is the amount of the execution and costs." This instruction is unobjectionable. In debt on a sheriff's bond for an escape out of execution, as in debt against the sheriff for such escape, we think the measure of damages is as stated by the Circuit Court in this case. See *Spader v. Frost*, above cited.

SULLIVAN, J., dissented as to the rejection of the evidence of *Williams*' insolvency, and as to the measure of damages.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

C. B. Smith and *J. Ryman*, for the plaintiffs.

S. W. Parker and *J. S. Newman*, for the defendant.

McCORMICK and Another v. McCLURE and Others.

REVERSAL OF DECREE — BONA FIDE PURCHASER. — If a person having obtained a decree in chancery for certain land and been put into possession, sell the land to a *bona fide* purchaser for value before a suit in error to

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reverse the decree is commenced,—the title of such purchaser, or of those claiming under him, will not be affected by a subsequent reversal of the decree.

[*467] SAME.—*And if, after such decree is reversed and the bill dismissed, a writ of restitution be opposed on the ground, supported by affidavit, that the facts are as above stated, the writ will be refused.

APPEAL from the *Switzerland* Circuit Court.

BLACKFORD, J.—*Samuel McCormick* filed a bill in chancery, in the *Switzerland* Circuit Court, against *James H. McClure* and others. The object of the bill was to obtain a decree for a certain tract of land, to which the complainant claimed title. The Circuit Court rendered a decree in favour of the complainant; and he was accordingly put into possession of the premises. That decree was afterwards reversed, on a writ of error sued out by the defendants, and the Circuit Court was instructed to dismiss the bill. In conformity with the instruction thus given, the bill was dismissed by the Circuit Court.

The defendants, *McClure* and others, then applied to the Circuit Court for a writ of restitution, by which they might be put into possession of the land, of which they had been deprived by the erroneous decree. The application was opposed by *McCormick*, the complainant, and by *Walter Armstrong*, who was alleged to be in possession of the premises as a purchaser from the grantee of *McCormick*. The Circuit Court ordered the writ of restitution to issue; and from that order, *McCormick* and *Armstrong* have appealed to this Court.

The motion for the writ of restitution was objected to on the affidavit of *Armstrong*, which stated that after the decree in favour of the complainant was rendered, and before the commencement of the suit in error in which that decree was reversed, the land was sold and conveyed by the complainant, who was in possession claiming under the decree, to one *Justice*; that the latter had sold the land to the deponent; that both *Justice* and the deponent were purchasers for a valuable consideration without notice; that *Justice* was in possession under his purchase when he sold to the deponent; and that the latter was in possession under his purchase when the motion for the writ of restitution was made.

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We think the affidavit shews that the motion for the writ of restitution should have been overruled.

[*468] *After the decree, and before the commencement of the suit in error, the suit in which the decree was rendered was not pending; and the land during that period, might be, *bona fide*, purchased for a valuable consideration from the complainant, and the title of the purchaser, and of those claiming under him, would not be affected by the subsequent reversal of the decree. *Lessee of Taylor v. Boyd*, 3 Ohio Rep., 337. *Heirs of Ludlow v. Kidd's Ex'rs et al.*, Id., 541. If, therefore, the matters which we have noticed, as stated in the affidavit, be true, the plaintiffs in the writ of error, who were the defendants below, could not have the land restored to them on the reversal of the decree, but must look to the complainant for remuneration. Whether those matters are true or not, is a question that ought not to be decided on a motion for a writ of restitution; and the defendants below must therefore resort to some other proceeding in order to have their claim to the land investigated and determined.

SULLIVAN, J., having been concerned as counsel in the cause, was absent.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. C. Eggleston, G. H. Dunn, and J. G. Marshall, for the appellants.

S. C. Stevens and M. G. Bright, for the appellees.

END OF MAY TERM, 1843.

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*CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1843, IN THE TWENTY-
EIGHTH YEAR OF THE STATE.

BRITTON *v.* MORSS.

REPLEVIN—PLEADING. In replevin in the *detinuit*, which is now the usual form, the declaration need not state the value of the goods.

ERROR to the *Allen* Circuit Court.

SULLIVAN, J.—Replevin by the plaintiff against the defendant for taking and unlawfully detaining a horse, &c. Pleas, 1, *Non cepit*. 2, *Non detinet*. 3, Property in the defendant, on which the plaintiff took issue. The defendant, for further defense, acknowledged the taking and justly, &c., because he said he was collector of the town of *Fort Wayne*, duly appointed, &c., and that as such collector, by virtue of a precept, and duplicates of the tax list for the taxes assessed by the Board of Trustees, &c., for the years 1838 and 1839, on which tax list there was charged to the plaintiff, &c., he did, for the purpose of collecting, &c., take, seize and detain the said horse, &c., as he lawfully might, &c. The plaintiff

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[*470] *demurred, and the Court considering the declaration to be bad, gave judgment for the defendant.

The objection taken to the declaration was that the value of the goods was not stated.

The Court erred in considering the omission a defect in the declaration. Anciently, when the action of replevin was in the *detinet*, it was necessary to state the value of the goods, because, as the goods were still in the possession of the defendant, the plaintiff, if he maintained his suit, recovered the value of the goods, as well as damages for their detention. But at the present day, in the action of replevin, the goods are delivered to the plaintiff when replevied, and their value need not be inquired into upon the trial, because if the plaintiff obtain a verdict, he is only entitled to damages for the wrongful taking and his costs. 1 Saund., 347, note 2; 3 Saund., 320, note 1.

There are some technical objections to the cognizance, but we think it sufficient on general demurrer.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

T. Johnson, for the plaintiff.

R. Brackenridge and *H. Cooper*, for the defendant.

BURTON v. TANNEHILL.

TROVER.—To sustain trover, the plaintiff must show a right to the possession of the goods at the time of the conversion.

CHATTEL MORTGAGE—POSSESSION OF GOODS.—If a person indebted by notes payable at different times, give a mortgage of goods to secure the payment of the notes as they shall severally arrive at maturity—the goods in the meantime to remain in the possession of the mortgagor—the mortgagee, on default of payment of either of the notes when due, is entitled to the possession of the goods.

SAME.—If, after any such default, the mortgagor mortgage the goods to a third person, with notice, the latter, if he take and convert the goods to his own use, is liable for them in trover to the first mortgagee.

Burton v. Tannehill.

SAME.—A mortgagee of goods does not, by recovering a judgment for the mortgage-debt, wave his lien on the goods.

ERROR to the *Vigo* Circuit Court.

SULLIVAN, J.—Trove by *Tannehill* against *Burton*. The facts were that one *Wernwag* was indebted to the [*471] defendant *in error in the sum of \$780, for which he had given his notes dated *November* the 28th, 1838, payable as follows, viz., \$200, *January* the 1st, 1839; \$100, *June* the 1st, 1839; \$100, eight months after date; and \$380, twelve months after date. To secure the payment of said notes as they should severally become due, he mortgaged to the defendant in error a wagon, six horses, &c. The mortgage contained a stipulation that the property should, “in the meantime,” remain in the possession of the mortgagor. The mortgage was recorded within the time prescribed by the statute. In the month of *April* following, *Wernwag* being indebted also to the plaintiff in error in a large amount, mortgaged the same property to him, and delivered to him the possession of it. After the delivery, and before the 21st of *May* next, the plaintiff in error sold the property for his own use. There was abundant evidence to prove that *Burton* knew of the mortgage to *Tannehill*, and there was evidence also from which it might be fairly inferred, that he sold the property to prevent it from falling into *Tannehill’s* hands. A part of the debt from *Wernwag* to *Tannehill*, due the 1st of *January*, 1839, was paid; for the residue, being \$100, judgment was obtained, but there was no evidence that it had been satisfied. The notes due on the 1st of *June* and on the 28th of *July*, respectively, remained unpaid. This suit was commenced in *October*, 1839. The defendant pleaded the general issue. Verdict and judgment for the plaintiff below.

This suit was brought for the conversion of the wagon and team mentioned above, and the right of *Tannehill* to maintain it is denied on the ground that he had not, at any time between the making of the mortgage and the commencement of the suit, a right to the possession of the property. Unless it shall

appear that he had the right of possession at the time *Burton* sold the property, he can not, it is clear, recover in this action. To determine this point, the meaning of the mortgage must be arrived at. The following is its language: "Now if the said party, &c., shall pay said notes as they shall severally arrive at maturity, then the above mortgage to be null and void, otherwise, &c.; and it is also stipulated that said property in the meantime is to remain" in the possession of the mort-
 [*472] gagor. By the words "in the meantime," *we understand the time between the execution of the mortgage, and the time at which either of the notes should fall due. If at the maturity of either of the notes, *Wernway* should fail to pay the amount due, his right to retain the possession of the property should cease, and the right of possession should devolve upon *Tannehill*. If that be the meaning of the contract, this case is distinguishable from the case of *Hamilton v. Mitchell*, May term, 1842. In that case the claimant of the property failed, because he had not a right to the immediate possession of the goods. We express no opinion on the question whether on failure of *Wernway* to pay either of the installments, *Tannehill* had a right to sell the property; we only say that the time for which the mortgagor had a right to retain the possession, expired on his failing to pay as the notes respectively became due. *Tannehill* having a special property in the goods, and the right of possession at the time of the sale by *Burton*, may therefore maintain an action of trover against him for the conversion of the goods.

It is again objected, that having commenced an action upon the note payable *January* the 1st, 1839, and having obtained a judgment for so much as was due at the time of the conversion by *Burton*, *Tannehill* waived his lien on the goods; that if he had intended to look to the mortgaged property for his security he should have taken possession of it. We do not think so. Every mortgage implies a debt, and a mortgagee may without returning the goods if they be in his possession have his remedy by action against the mortgagor, unless there be a special agreement to look to the property only, in which case the per-

Hoover v. Johnson.

son of the mortgagor is discharged. *Strange*, 919; 3 P. Will., 358; 2 Stark. R., 72; 4 Carr. & P., 151.

The objections made by the defendant in the Circuit Court to the admissibility of the mortgage in evidence, and against the testimony of *Smith*, are unavailing.

Per Curiam.—The judgment is affirmed, with three *per cent.* damages and costs.

J. P. Usher, *W. D. Griswold*, and *W. J. Brown*, for the plaintiff.

C. W. Barbour, *A. Kinney*, and *S. B. Gookins*, for the defendant.

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*HOOVER v. JOHNSON.

PROMISSORY NOTE—VARIANCE.—Debt on a promissory note payable eight months after date. The plaintiff offered in evidence the following note made by the defendant: "Eight months after date, I promise to pay, &c., the sum of, &c., to be paid as soon as I get my returns from *New Orleans* or the above date at farthest, for value received." Held, there was no variance.

ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—*Hoover* declared in debt against *Johnson* on a promissory note for the payment of a certain sum of money in eight months after date. Plea, the general issue. Verdict and judgment for the defendant. On the trial the plaintiff produced a note, made by the defendant, as follows: "Eight months after date, I promise to pay (the plaintiff) or order the sum of, &c., to be paid as soon as I get my returns from *New Orleans*, or the above date at farthest, for value received." The Circuit Court rejected the note on the ground of variance. The suit was commenced after the lapse of eight months from the date of the note.

We do not understand the rejected note as containing an

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alternative promise, giving the maker the choice of which of the alternatives he would perform. Were such the fact, the rejection of the note would unquestionably have been correct, for an alternative contract will not support an action founded on one absolute in its terms. *Tate v. Wellings*, 3 T. R., 531. See, also, *Layton v. Pearce*, Doug., 15. The note, which was offered in evidence, contained an absolute promise by the maker to pay the stipulated sum in eight months, with an additional undertaking to pay it sooner, on the happening of a certain contingency. These two promises are independent of, and do not qualify each other. Had the defendant received "his returns from *New Orleans*," which we suppose means a remittance of money, before the lapse of eight months, he might have been sued immediately on his promise to pay on the happening of that event. But whether that event ever happened or not, after the expiration of eight months, he was liable to a suit on his promise to pay in that period. The plaintiff has sued on this latter promise; and he was not bound to set out in his declaration the other promise, of the [*474] breach of which he does not complain. The *omission of it constitutes no variance. *Miles v. Sheward*, 8 East, 7; *Tempest v. Rawling*, 13 Id., 18. The Circuit Court erred in rejecting the note.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Z. Baird, for the plaintiff.

H. S. Lane and *S. C. Willson*, for the defendant.

THE STATE v. BERTHEOL.

DISORDERLY HOUSE—NUISANCE.—A public and disorderly liquor and store house in a town, in and about which dissolute persons are permitted, for lucre, to remain at night and in the day time, drinking, tippling, carousing, swear-

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ing, hallooing, &c., to the damage, disturbance, &c., is a public nuisance, and the keeper of it is indictable.(a)

ERROR to the *Shelby* Circuit Court.

DEWEY, J.—This was a prosecution for a nuisance. The indictment charges that the defendant kept “a public, common, ill-governed, and disorderly liquor and store house” in *Shelbyville*, and in the same and along the street adjoining thereto, caused to frequent and come together persons of evil name and dissolute conversation; and permitted them, for lucre, to be and remain, as well in the night as in the day time, in and about the said house, “drinkling, tippling, carousing, swearing, cursing, hallooing, quarreling, and misbehaving themselves, to the great damage, disturbance, and common nuisance,” &c. On the motion of the defendant, the Court quashed the indictment.

The question is, whether the matters alleged in the indictment constitute a public nuisance?

Our statute prescribes the punishment for a common nuisance, but it does not define the offense. We must, therefore, refer to the common law to learn in what it consists. *Blackstone* describes a common nuisance as being “any thing that worketh hurt, inconvenience, or damage” to the public. 3 Comm., 215. And he classes disorderly inns, alehouses, gaming houses, “and the like,” under this head. Common stages for rope dancers and mismanaged theatres are [*475] *nuisances, because their tendency is to encourage idleness, to corrupt the public morals, and to draw together numbers of disorderly persons to the annoyance of the neighbourhood. 5 Bac. Abr., 147. So, making a great noise in the night with a speaking trumpet has been held to be an indictable nuisance. *Rex v. Smith*, 2 Strange, 704. It is impossible not to perceive that a common tippling-house, in and about which idle and dissolute persons are encouraged to assemble, and are permitted to drink, swear, quarrel, and shout, by night as well as by day, has the same evil tendencies as the nuisances

(a) *Hackney v. The State*, 8 Ind., 494; 8 Blackf., 205; Id., 260.

 Stevens v. Doe, on the Demise of Henry.

referred to. We think it should be ranked in the same class with them, and that the Circuit Court erred in quashing the indictment.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. A. Hammond, for the State.

S. Major, for the defendant.

 STEVENS v. DOE, on the Demise of HENRY.

ACKNOWLEDGMENT OF FEME COVERT.—If the certificate of the proper officer on a conveyance of real estate, of the acknowledgment of a *feme covert*, show that she acknowledged before him that she had voluntarily executed the conveyance, it is sufficient under the statute of 1824.(a)

SAME.—It will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife and the making her acquainted with the contents of the conveyance.

APPEAL from the *Dearborn* Circuit Court.

BLACKFORD, J.—This was an action of ejectment against *Stevens* for a tract of land in *Dearborn* county. The cause was submitted to the Court, and judgment rendered for the plaintiff.

The facts are as follows: The lessor of the plaintiff and her husband, *John Henry*, since deceased, were seised of the premises described in the declaration, by virtue of a conveyance thereof executed to the lessor in 1823. Whilst the lessor was such *feme covert*, she and her husband, by a deed acknowledged in 1826, conveyed the premises to *Benjamin*

[*476] * *Wilson*, who afterwards conveyed the same to *Joshua Wilson*, under whom the defendant claims. The only question in the cause is, whether the certificate of *Mrs. Henry's* acknowledgment of the execution of the deed to *Benjamin Wilson*, indorsed on the deed, is sufficient to bind her?

The certificate in question is in these words; “The State of

(a) *Jordan v. Corey*, 2 Ind., 385.

Stevens v. Doe, on the Demise of Henry.

Indiana, Dearborn county, ss. Before me, D. Weaver, a justice of the peace within and for the said county, personally appeared John Henry and Martha Henry his wife, the said Martha Henry being examined separate and apart from her husband as the law directs, and acknowledged the above deed of conveyance to be their voluntary act and deed for the uses and purposes therein mentioned. In testimony whereof, I have hereunto set my hand and seal this 8th of September, 1826. Davis Weaver, J. P. (seal.)"

The statute of 1824, which governs this case, states, that whenever a husband and wife shall incline to convey the estate of the wife, &c., it shall be lawful for them to execute a conveyance, &c., and appear before one of the judges, &c., "who are hereby authorized and required to take such acknowledgments; in doing which, he or either of them shall examine the wife separate and apart from her husband, and shall read or otherwise make known the full contents of such deed or conveyance to the said wife; and if upon such separate examination, she shall declare that she did voluntarily and of her own free will and accord, and as her act and deed, seal and deliver the said deed or conveyance without any coercion or compulsion from her husband, every such deed or conveyance shall be and the same is hereby declared to be good and valid in law, &c. Provided, that the judge, justice, or recorder, taking the same, shall, under his hand and seal, certify the same upon the back of such deed or conveyance." R. C., 1824, p. 334.

It is the officer's duty, by this statute, before he takes the acknowledgment of a *feme covert*, to examine her apart from her husband, and make known to her the contents of the deed; and if, upon such examination, she declares either expressly, or in language implying it, that she had executed the deed voluntarily, &c., the officer must, under his hand and seal and on the deed, certify *the same*, that is, he must certify

[*477] *on the deed that such declaration or acknowledgment of the voluntary execution of the deed was made before him. But the statute does not require, as we

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understand it, the certificate to show anything more on the subject than the declaration or acknowledgment of the wife that she had voluntarily executed the deed. It will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife, and the making her acquainted with the contents of the deed. It is the acknowledgment only, not the circumstances under which it was made, that is required to be certified.

According to this view of the statute, the certificate of *Mrs. Henry's* acknowledgment of her execution of the conveyance of the land in dispute to *Benjamin Wilson* is sufficient; and the judgment in her lessee's favour is erroneous.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

A. Lane, for the appellant.

G. H. Dunn and *J. C. Eggleston*, for the appellee.

WATSON v. CLENDENNIN and Others.

PRACTICE.—If after a demurrer for multifariousness to a bill in chancery is overruled, the defendant answer the bill, the objection to it for multifariousness is waived.

DOWER IN MORTGAGED PREMISES.—If a widow, who in her husband's lifetime had joined with him in the execution of a mortgage of real estate, have not redeemed the mortgage, she has no better claim to dower in the premises than she would have had if the deed had been absolute.

ACKNOWLEDGMENT OF FEME COVERT.—If the certificate of the proper officer on a conveyance of real estate, of the acknowledgment of a *feme covert*, state that she acknowledged she had voluntarily executed the conveyance, it is sufficient under such statutes on the subject as that of 1824.

CERTIFICATE.—Such certificate, however, under the statute in force in 1818, must be under the hand and seal of the officer. (a)

APPEAL from the *Orange Circuit Court*.

BLACKFORD, J.—*Mrs. Watson*, formerly the wife of *James*

(a) *Maxcy v. Wise*, 25 Ind., 1.

Pierson, deceased, and now the widow of *B. M. Watson*, deceased, filed a bill in chancery against the defendants, in *which she claimed dower in a certain tract of land in *Orange* county, and in several lots of ground in *Paoli*. The bill was demurred to by some of the defendants for multifariousness, but the demurrer was overruled; and the defendants afterwards all filed their answers to the bill. The cause was tried on bill, answers, exhibits, and depositions, and the bill dismissed for want of equity.

The defendants who demurred, waived, by subsequently answering the bill, their objection to it for multifariousness. *Ward v. Cooke*, 5 Madd., 122; *Bryan v. Blythe*, 4 Blackf., 249; *Cummins v. White*, Id., 356.

It appears that *James Pierson*, deceased, the first husband of the complainant, was seized of the land and lots described in the declaration during the coverture; and that he and the complainant, his wife, executed absolute conveyances for part of the property, and a mortgage for the residue, to various persons under whom the defendants claim. As it is not shown that the complainant has redeemed the mortgage, she has no better claim to dower against the mortgagees or those claiming under them than she would have had if the deed had been absolute. *Gibson v. Crehore*, 5 Pick., 146.

The principal question in the cause is whether the certificates on the conveyances of the complainant's acknowledgments of her execution of them are sufficient?

Those certificates are of various forms, but they all show that the complainant acknowledged the conveyances to have been voluntarily made. Such certificates, signed and sealed by the proper officer, have been decided to be sufficient under the statute of 1824, which is the same with the statutes under which the certificates now before us were made. *Stevens v. Doe*, dem. *Henry*, at this term.

The certificate, however, indorsed on the conveyance of lots numbered 81 and 112 has no seal, and it is, for that reason, defective. That certificate is dated in 1818, and the statute then in force required, as the present statute re-

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quires, the certificate in such cases to be under the hand and seal of the officer. The suit is against *Jonathan Braxton* as to the last named lot, and against *Thomas Coffin* as to the other; and the bill as to those two defendants ought not to have been dismissed.

[*479] *The certificates on the other conveyances in question are valid, and the bill as to the defendants claiming under those conveyances were correctly dismissed.

Per Curiam.—The decree is reversed as to *Braxton* and *Coffin*, and affirmed as to the other defendants. Cause remanded, &c.

J. Collins, for the appellant.

J. W. Payne and *H. P. Thornton*, for the appellees.

BISEL and Another v. HOBBS and Another.

NEW TRIAL.—The granting or refusing of a new trial may be assigned for error.

PARTNERSHIP, EVIDENCE OF.—The defendant's acknowledgment of the partnership of the plaintiffs, is sufficient evidence of such partnership.

SAME.—In a suit against partners in a distillery and in the purchase of corn, the plaintiff may give in evidence the receipt of one of the defendants, acknowledging the delivery of a certain quantity of corn to him by the plaintiff.

SAME—FIRM DEBT.—If goods be purchased by a partner for the use of the firm, the seller may sue the partners for the price, though he did not know at the time of the sale, of the existence of the firm.

APPEAL from the *LaGrange* Circuit Court.

SULLIVAN, J.—Assumpsit by the appellees against the appellants for goods, &c., sold and delivered. Plea, the general issue. At the *October* term, 1842, here was a trial of the cause, and a verdict was rendered for the appellants. A new trial was granted, at the *April* term, 1843, the appellees obtained a judgment.

The first error complained of by the appellants is, that the Court set aside the first verdict and granted a new trial.

The granting or refusing a new trial must, for the ad-

vancement of justice, be necessarily confided in a great measure to the discretion of the Court, that hears the testimony and witnesses the progress of the trial. The case must be a very plain one, that will justify this Court in interfering with this discretion. Where manifest injustice has been done, however, and a new trial has been refused, it will be error as has been repeatedly decided. So, where a verdict has been set aside and a new trial granted, for reasons [*480] not recognized by the law, and upon the second trial, judgment has been rendered in favour of the party obtaining the new trial, that judgment will be reversed, and the party that obtained the first verdict will be restored to his rights under that verdict. *Cummins et al. v. Walden*, 4 Blackf., 307.

On the first trial, an important fact for the determination of the jury was, whether the plaintiffs were, as they represented themselves to be, partners in the contract. After the testimony was through, the plaintiffs moved the Court to instruct the jury, that if they believed either from the written or parol testimony which had been introduced on the trial, that the defendants had acknowledged the partnership of the plaintiffs, it would be sufficient proof of that fact. The Court refused the instruction, and the defendants obtained a verdict. The Court erred in withholding the instruction asked. The acknowledgment and recognition of the plaintiffs as partners by the defendants, if not contradicted or explained by other proof, were sufficient to establish the partnership. The Court having inadvertently fallen into an error, did right in hastening to correct it by granting a new trial.

On the second trial, the plaintiffs having proved that the defendants were partners in a distillery and in the purchase of corn, offered in evidence certain receipts, after having proved their execution, signed by the defendant *Martin*, acknowledging the delivery of 1,032 bushels of corn by the plaintiffs to the defendant *Martin*. The defendants objected to the evidence, but the Court received it. The admission of this testimony is said to be error. The Court did not err

in admitting those receipts in evidence. The partnership of the defendants being proved, it was proper that it should be left to the jury to determine whether the corn, delivered to one of the partners, was delivered on partnership account or not; and the receipts might be an important link in the chain of evidence to establish that fact.

At the request of the plaintiffs, the Court gave the following instruction to the jury, to which the defendants excepted, viz.: If the jury believe from the evidence, that *Peter Bisel* and *Selden Martin* were in partnership in a distillery at the time the corn was purchased, and if they believe it [*481] was *purchased by one of the partners for the use of the firm, they should hold both liable, although the plaintiffs did not know at the time of the existence of the partnership. There was no error in that instruction. The principle asserted is, that to give to the plaintiffs a right of action against the defendants for the corn sold and delivered to one of the defendants for the use of the firm, it was not necessary that the plaintiffs should know, at the time of the sale and the delivery, that the defendants were partners. This is undoubtedly the law. Even in respect to secret partnerships, where the credit is given to the ostensible party, if it be in the course of the business of the partnership, and for the common benefit, the secret and silent partners are bound; for those who are to receive the benefit, are also bound to bear the burthens. *Bank of U. S. v. Binney et al.*, 5 Mason's R., 176. In the case of *Swan et al. v. Steele et al.*, 7 East's R., 210, it is said there may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name of the partnership. The same doctrine is recognized in *Vere et al. v. Ashby et al.*, 10 B. & C., 288.

There is no error in the case for which the judgment should be reversed.

Per Curiam.—The judgment is affirmed with three per cent. damages and costs.

 Murphy v. Elliott.

H. Cooper and *J. B. Howe*, for the appellants.

D. H. Colerick, for the appellees.

SCHOOLCRAFT v. CAMPBELL, in ERROR.

A CONVEYANCE of land situate in *H.* county was executed in *G.* county, both counties being in this State, and was acknowledged before a justice of the peace of *G.* county, a certificate of the clerk of the Circuit Court of the latter county being attached as the statute requires. *Held*, that the conveyance was legally executed.

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*MURPHY v. ELLIOTT.

PURCHASE OF EQUITY OF REDEMPTION BY MORTGAGEE.—A mortgagee of land who purchases the equity of redemption at sheriff's sale, thereby extinguishes the mortgage debt to the extent of the value of the mortgaged premises, after deducting the sum paid for the equity of redemption.(a)

VENDOR'S LIEN, EXTINGUISHMENT OF.—A vendor claiming a lien on land for a part of the purchase-money due, and purchasing the same land sold on execution subject to such lien, thereby extinguishes the debt so claimed as a lien, to the extent of the value of the land purchased, after deducting the sum paid on such sale.

ERROR to the *Henry* Circuit Court.

DEWEY, J.—*Elliott* brought an action of assumpsit against *Murphy* for money had and received. Plea, the general issue. The cause was submitted to the court upon an agreed case. The facts were substantially the following: One *Owen* purchased of the plaintiff certain tracts of land, at the price of \$2,500, \$1,411.12 of which were paid by *Owen*; for the balance, being \$1,088.88, he mortgaged to the plaintiff a part of the purchased premises. A part of the payment made by *Owen* to the plaintiff consisted of an equitable assignment of a demand in favour of the former against one *Stephenson*; for this demand a suit was commenced in *Owen's* name against

(a) *Foltz v. Peters*, 16 Ind. 244; 4 Id. 134; 7 Blackf. 174.

Stephenson, in the *Henry* Circuit Court, judgment was recovered for \$211.12, the money collected and paid to the defendant, who was clerk of the Court, he having notice of the equitable assignment of the debt to the plaintiff, and of his claim to the money. Before the judgment was satisfied, *Owen* made an equitable assignment of it to two other persons jointly, who also had notice of the plaintiff's claim to the debt. After the money came to the defendant's hands, the plaintiff demanded it of him; he refused to pay it on account of the conflicting claims to it. Prior to the assignment of the judgment by *Owen* to the two persons, and before the money was collected upon it, a judgment-creditor of *Owen* issued an execution against him upon which the premises mortgaged to the plaintiff were about to be sold by the sheriff. The plaintiff claimed a lien on the land to the amount of \$1,300, founded partly on the mortgage, and partly on the amount due him

for that portion of the price of the land not secured [*483] by the mortgage, it being the amount of *the judgment against *Stephenson*. Appraisers were appointed, who valued the mortgaged premises, subject to the whole lien claimed by the plaintiff, at \$1,288. The property was sold by the sheriff on the execution against *Owen*, subject to that lien, to the plaintiff for one dollar, that being his bid. Subsequently to this last transaction, this action was commenced to recover the money in the defendant's hands received on the *Stephenson* judgment. The Circuit Court rendered a judgment in favor of the plaintiff for the amount of that money and interest.

The question growing out of the foregoing facts is, what is the effect of the plaintiff's purchase of the land at sheriff's sale upon the debt due him from *Owen*? Does it leave it still due, or does it extinguish the debt?

We will, in the first place, consider the question in reference to the mortgage debt. The plaintiff purchased at that sale the equity of redemption, which was all the right or interest that *Owen* had in the premises, the legal time being in the plaintiff as mortgagee. Had a stranger made the same

Murphy v. Elliott.

purchase, the only right he would have acquired would have been that of redeeming the land by the payment of the mortgage debt to the plaintiff. He could not have procured the legal estate vested in him, as mortgagee, on any other terms. Can the mortgagee, by purchasing the equity of redemption at sheriff's sale, stand in a better situation than a stranger would? What is there in principle to distinguish the two cases? The mortgagee is, indeed, saved the trouble of taking any further steps to perfect in himself an indefeasible title to the mortgaged premises. Such a title he acquires by purchasing the equity of redemption; but he must take it upon the same terms, on which a stranger would acquire it,—by paying the price of the equity of redemption, and by extinguishing the mortgage debt due to himself, or at least by extinguishing it to the extent of the value of the land after deducting the sum paid for the equity of redemption. If this be not the law, a mortgagee may acquire an absolute title to land mortgaged for its full value by simply paying what the equity of redemption will bring under the hammer,—a mere nominal sum, and that even, no one but himself would pay.

Indeed, if this be not the law, this plaintiff has acquired [*484] title to land worth \$1,288 for one dollar; for his title to the land is perfect, and he may still collect the debt due him from *Owen*,—that very debt for which he claimed a lien upon the land, and which enabled him to purchase it at a nominal price. We can not accede to such a principle. And we have come to the conclusion, that a mortgagee, by purchasing at a sheriff's sale on execution the equity of redemption, thereby extinguishes, to the extent of the value of the mortgaged premises, after deducting the sum paid for the equity of redemption, the mortgage debt.

It remains to be inquired whether that part of the debt, once due from *Owen* to the plaintiff, which was not secured by the mortgage, is still due; for on this question depends the right of the plaintiff to the money in the defendant's hands. This inquiry is virtually answered by what has already been said. We do not stop to inquire whether, under

the circumstances of the case, the plaintiff really had a right to set up any other lien against the mortgaged premises than what arose from the mortgage. He did make such a claim to the amount of the money now sued for. The land which he purchased was sold subject to that claim as well as to the mortgage, making the aggregate charge upon the land \$1,300; the land was worth \$1,288, leaving \$12.00 due the plaintiff, to which add the dollar paid for the land, and then \$13.00 are still due him from *Owen*. This sum, together with interest from the time the demand was made on the defendant, the plaintiff is entitled to recover in this action and no more; for the balance of his debt against *Owen*, he has had satisfaction in a manner of his own choosing,—by taking the land subject to a lien which he claimed for the unsecured part of the purchase-money, as he took it subject to the mortgage. In this view of the subject there is no hardship to the plaintiff; and in any other, great injustice would be done to *Owen*. The plaintiff voluntarily made the charge upon the land overreach its value, and thereby prevented competition at the sheriff's sale. Had he left the land subject to the mortgage only, the equity of redemption would have been worth about \$200; and there might have been bidders for it at something like its value, which would have in-
[*485] ured to *Owen's* benefit. But this chance the *plaintiff saw fit to destroy, and it is no more than right that he should abide the consequences. The plaintiff, by claiming a lien upon the land for the unsecured part of the purchase-money, and by purchasing it subject to that lien, relinquished his claim upon the judgment against *Stephenson*, to the extent of the satisfaction received by him in the land, that is, to the whole except \$13.00 and interest. The balance of it *Owen* was at liberty to dispose of to whom he pleased.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

J. T. Elliott, for the defendant.

Depew v. Wheelan and Another.

DEPEW v. WHEELAN and ANOTHER.

LOST NOTE.—The payee of a lost promissory note, not having indorsed it, may maintain an action at law on it against the maker.

SAME—EVIDENCE.—The facts that a note was sent by mail in a letter directed to a postmaster in another State, to have its execution proved, and that it had not been returned, do not sufficiently prove the loss of the note to authorize parol evidence of its contents.

PRACTICE.—To authorize the plaintiff in a suit on contract against two to proceed to judgment against one alone, it must appear that the other was not found.(a)

APPEAL from the *Marion* Circuit Court.

DEWEY, J.—*W. E. and J. G. Wheelan*, the payees, sued *Depew* and *Hammick*, the makers of a promissory note, in debt before a justice of the peace. A declaration was filed which sets out the note and alleges it to be lost. Process was served upon *Depew*, but no return was made as to *Hammick*. *Depew* appeared before the justice, and pleaded non-assumpsit under oath. The plea was set aside by the justice on the motion of the plaintiffs. Judgment for *Depew*. The plaintiffs appealed. Among the papers sent up to the Circuit Court by the justice was the rejected plea, of which no notice was taken in that Court. The cause was submitted to the Court. The plaintiffs proved by their attorney that the note described in the declaration was in his hands some time before the commencement of this suit; that he had commenced a previous action [*486] upon it in the *Hancock* Circuit Court; that for the purpose of proving the execution of the note by the makers, he had inclosed it, with a *dedimus*, in a letter directed to the postmaster at *Mount Pleasant*, *Montgomery* county, *Kentucky*, with the view of taking the deposition of a witness residing there; and that this was the last personal knowledge he had of the note. He further stated that he had written to the dead letter office at *Washington*, making inquiry after the note, but received no information respecting it. This was all

(a) 7 Blackf., 101.

the evidence in relation to the loss of the note, except some hearsay testimony which was objected to, and which ought to have been rejected. The attorney was then permitted to testify to the contents of the note, though an objection was made to his doing so. Judgment for the plaintiffs against *Depew*.

The first question which presents itself for our consideration is whether an action at law will lie on this note, supposing it to be lost?

There has been a diversity of judgment in the *United States* upon the subject of maintaining suits at law upon lost bills against the acceptor; the Courts of some of the States holding the affirmative and those of others the negative of the proposition. Story on Bills, § 449. In *England*, after some clashing of opinion among the judges in various cases, it is finally decided that the indorsee of a lost bill of exchange, indorsed in blank, can not maintain an action in a court of law against the acceptor, though the loss occurs after the maturity of the bill. The decision rests upon the principle of the law-merchant that the acceptor is entitled to receive the bill when he pays it, in order to guard himself against a second liability, and that he may possess a voucher in his dealings with the drawer. And it makes no difference, though a subsequent holder might be defeated in an action on the bill by proof of its previous loss and payment, and of his having acquired it after maturity, it being unreasonable to throw the burthen of such proof on the acceptor. The remedy is in equity, where the acceptor may have adequate indemnity against any future claim in consequence of the lost bill. *Hansard v. Robinson*, 7 B. & C., 90. But if the bill, when lost, had not been transferred, or been indorsed in full (an indorsement being necessary to [*487] transfer it), the *payee, or the indorsee, may maintain an action against the acceptor, because no subsequent holder could show a title to the bill so as to maintain an action upon it. *Long et al. v. Bailie*, 2 Campb., 214, n. See, also, *Rolt v. Watson*, 4 Bing., 273.

If we grant, what we do not decide, that these principles are applicable to the note sued on, which, though not governed by

Depew v. Wheelan and Another.

the law-merchant, is transferable by indorsement under our statute, still we see no reason why this suit should not be maintained so far as the question under consideration is concerned. The note is averred in the declaration to be lost, but there is no averment, or proof, that it was ever indorsed by the plaintiffs. There was testimony that if it be lost, it was lost from the possession of the agent of the plaintiffs. This, we think, raises a fair presumption, that they never transferred it; and of course no other holder can show title to it. The makers are in no danger of a second liability.

The next question is as to the sufficiency of the proof of the loss of the note to let in parol evidence of its contents. In our opinion the proof was not sufficient. The statement of the witness renders it very probable, that the note reached the hands of the postmaster in *Kentucky* to whom it was directed. For aught that appears it is still in his hands. There should have been some evidence of the disposition made of it by him. The Circuit Court erred in receiving parol evidence of the contents of the note.

There is also another error in the proceedings. The action was commenced against two defendants. Before a legal judgment could be taken against one of them, the action being founded on contract, it should have appeared that the other was not found. This does not appear by the justice's transcript or any other part of the record.

It is contended that the plaintiffs were bound to prove the execution of the note by *Depew*, in consequence of the plea of non-assumpsit under oath sent up by the justice. We do not think so. The plea having been rejected by the justice constitutes no part of the record.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the appellant.

W. W. Wick and *L. Barbour*, for the appellees.

The State v. Beackmo.

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*THE STATE v. BEACKMO.

PRESUMPTION AS TO CITIZENSHIP.—The law presumes all persons who reside here to be citizens of the *United States* until the contrary appears.

DAMAGES—EVIDENCE.—A person claimed damages of the State, under the statute concerning internal improvements, because the *Wabash* and *Erie* canal was cut through his land, separating that part of it on which his dwelling house stood from the rest of the tract, and causing a part of his land to be overflowed. *Held*, that the State might prove, to lessen the damages, how much it would cost to build a bridge on the land over the canal, and what would be the expense of draining off the water.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—*Beackmo* having petitioned the board of internal improvement respecting damages to his land, &c., occasioned by the construction of the *Wabash* and *Erie* canal, appraisers were appointed and the damages assessed. He appealed to the Circuit Court and obtained a verdict and judgment.

On the trial, a witness being asked by the defendant whether or not the plaintiff was a *German*, answered that he had understood he was a *Hollander*. This was all the evidence offered to show that the plaintiff was an alien; and there was none of his having made a declaration, &c., of his intention to become a citizen of the *United States*.

In regard to this part of the case, instructions were given to the jury, to one of which the defendant excepted. The instruction objected to is as follows: "The law presumes that all persons who live among us are citizens of the *United States* until the contrary appears by clear proof." We see no objection to this instruction. The defendant's object was to prevent a recovery of damages, on the ground that the plaintiff was an alien, and not having made a declaration, &c., was not entitled to the land for the injury to which he claimed damages. The affirmative of the issue was on the State. It was for the State to establish the objection on which it relied, viz., the alienage of the plaintiff, to the satisfaction of the jury; and that is all which is really said by the instruction in question.

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The plaintiff having proved that the canal was cut through his land, separating that part of it on which the [*489] dwelling *house was situate from the rest of the tract, the defendant offered to prove what the expense would be of building a bridge on the land over the canal, but the evidence was rejected. The plaintiff having also proved that a part of his land was overflowed in consequence of the canal, the defendant offered to prove how much it would cost to drain off the water, but this evidence was likewise rejected.

The Court evidently erred in both instances in rejecting the testimony offered. The *quantum* of damages to the plaintiff, occasioned by the canal's separating a part of the plaintiff's land from the rest of the tract, was a subject of inquiry for the jury, and, surely, in making that inquiry, it would be important for them to know how much it would cost to build a bridge across the canal, which would necessarily lessen considerably the inconvenience complained of. If by a bridge that should cost \$50.00, the plaintiff could again have easy access to every part of his land, the injury arising from the obstruction in question would not be as great as if the necessary expense of the bridge should be \$1,000. So, the jury were to inquire into the damages which were occasioned by the overflowing of the land; and in ascertaining their amount, it would be important for them to know whether it would require a large or only a small sum to drain off the water.

It seems clear, that the amount of the damages claimed in this case could not but be affected by what it would cost to materially lessen, or entirely avoid, the injury of which the plaintiff complains.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Jenners, for the State.

D. Mace, for the defendant.

GROVES v. THE STATE.

USURY—INDICTMENT.—An indictment for usury stated that the agreement was to pay the usurious interest in advance, at the time the loan was made; but the evidence to support it was, that the agreement was to pay the usurious interest three months after the loan was made. *Held*, that there was a fatal variance.

[*490] *ERROR to the *Henry* Circuit Court.

BLACKFORD, J.—This was an indictment against the plaintiff in error for usury. Plea, not guilty. Verdict and judgment for the State.

The indictment charges that the defendant, on, &c., at, &c., having lent to one *Henry Furry* the sum of \$90.00 for the term of three months then next following, did then and there unlawfully and usuriously ask, demand, and receive in advance, of and from him the said *Henry Furry*, the sum of \$5.00 as interest for the use of the said sum, &c.; being a much larger rate of interest, &c.

On the trial, the Court instructed the jury, that if they were satisfied that the defendant lent to *Furry* the sum of \$90.00 for ninety days, and took from him a promissory note for \$95.00, payable three months after date; and that after the note became due, *Furry* paid the defendant the \$95.00 in cash, and paid in work and cash at the rate of ten *per cent. per annum* for the forbearance of the \$95.00; the indictment would be sustained.

We understand the indictment to allege that the contract was for a loan of \$90 for three months, for which loan \$5.00 as interest were to be paid in advance, at the time of making the loan; and that the \$5.00 were accordingly paid in advance, in pursuance of the contract. The indictment so understood would not be sustained by proof of the facts mentioned in the instruction to the jury, because the contract proved would not be the same with that described in the indictment. According to the indictment the agreement was to pay the usurious interest in advance, at the time the loan was made, but according to

Chamberlain v. Blue and Others.

the evidence, the agreement was to pay it, not in advance, but three months afterwards, that is, when the principal should become due. That is a fatal variance. We decided at the last term, that an indictment for usury, alleging the loan to have been made for three months, was not supported by evidence of a loan made for three months and for one month in addition at the option of the borrower. *Merriman v. The State*. The principle on which that case was decided must govern the one before us; it is this, that if there be a variance [*491] between *the contract alleged in the indictment and that proved on the trial, the prosecution must fail. 2 Stark. Ev., 1186.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

C. H. Test, for the plaintiff.

H. O'Neal, for the State.

CHAMBERLAIN v. BLUE and Others.

SPECIFIC PERFORMANCE.—A Court of chancery may decree the specific performance of a contract to indemnify the complaint against a pecuniary liability.

SAME.—And the circumstance that the performance of the contract is secured by a penalty makes no difference.

ERROR to the *St. Joseph* Circuit Court.

SULLIVAN, J.—The complainant filed his bill for the specific performance of a contract, by which the defendants covenanted to indemnify him from the payment of certain debts specified and referred to in the contract. The bill states that *Chamberlain*, the complainant, and *Blackford Blue*, one of the defendants, had been partners in trade by the name and style of *Chamberlain and Blue*; that at the time of the dissolution of the partnership, they were indebted to certain persons trad-

ing together by the name and style of *Ames and Holliday* the sum of \$426.76, which the defendants covenanted should be paid by the said *Blackford Blue*, and that they would pay to *Chamberlain* any damages he might sustain in any way, if *Blue* should fail to make the payment; that *Blue* as well as the other defendants had failed to pay said debt; and that a judgment at law had been obtained by the assignee of *Ames* and *Holliday* against the complainant, but that said judgment had not been satisfied. Two of the defendants, *Blackford Blue* and *John Gilmore*, made no defense; the other defendant, *John L. Blue*, answered, admitting the facts stated in the bill, but insisted that the complainant was entitled to no relief in a Court of equity. He also pleaded his infancy. The cause was set down for hearing on bill and answer, and at the final hearing the bill was dismissed for want of equity.

[*492] *The only question to be considered is, whether a Court of chancery can afford the complainant the relief he prays upon the contract set out in his bill, which is one sounding in damages merely.

As a general rule, a Court of chancery will not interfere in such cases. There are cases, however, where on contracts sounding in damages only, a Court of chancery will exercise its jurisdiction. As, for example, where there was a contract for the sale of a large quantity of iron to be paid for in a certain number of years by installments, a specific performance was decreed. 3 Atk., 384; *Adderly v. Dixon*, 1 Sim. & Stu., 607. And in *Buxton v. Lister*, 3 Atk., 383, which was a bill for the specific performance of a contract for the delivery of certain timber at specified periods, Lord *Hardwicke*, held that a Court of equity could grant relief in such a case, though in that case the bill was dismissed on account of fraud in the vendor. The exercise of this jurisdiction, however, is limited to cases where a compensation in damages would not afford a full, complete, and satisfactory remedy. Courts of equity will also, in many cases, decree the specific execution of personal contracts, where injury is apprehended but not yet sustained. The case of a surety who, to relieve his mind from the apprehen-

sion of future damage, files a bill to compel the principal debtor on a bond with whom he has joined to pay the debt when due, whether the surety has been actually sued or not, affords an instance in which the jurisdiction will be exercised. 2 Story's Eq., 35, and note.

Analogous to the instance last put in illustration of the above principle, is the case of a general covenant to indemnify, which, although it sounds in damages only, a Court of equity will decree the specific performance of. The jurisdiction is exercised upon the principle on which the Court entertains bills *quia timet*. The leading case in support of the exercise of the jurisdiction in cases of covenants to save harmless, is *Ranelaugh v. Hayes*, 1 Vern. Rep., 189. The facts of that case were substantially as follows: *Ranelaugh* assigned several shares of the excise to *Hayes*, who covenanted to save *Ranelaugh* harmless in respect to that assignment, and to stand in his place touching the payment to the King. Upon *R.*

being sued by the King, the former filed a bill against [*493] **H.* for a specific performance of his agreement, which was decreed accordingly; and it was compared to the case of a counter-bond, where, although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, a Court of equity will decree the principal to pay the debt. That case, in its principal features, strongly resembles the one under consideration. Undoubtedly, *Ranelaugh* might have maintained an action at law on the covenant, and recovered damages to some extent; but, under the circumstances, it may be that no damages would have compensated him for the injury he would sustain by the failure of *Hayes* to perform his contract specifically.

In *Champion et al. v. Brown et al.*, 6 Johns. Ch. Rep., 398, the chancellor of *New York* acknowledged the authority of the case of *Ranelaugh v. Hayes*, and decided that equity might decree the specific performance of a general covenant of indemnity though it sounds only in damages.

The case last cited deserves to be more particularly noticed.

Henry Champion and *William L. Storrs*, and the administrators and heirs of one *Paddock*, deceased, filed a bill against the defendants for the specific performance of a contract, by which *Henry Champion* and *Lemuel Storrs* agreed to sell and convey to *Paddock* a tract of land for the sum of \$8,000; \$500 to be paid in cash, and the residue in six equal annual installments, &c. *Paddock* died intestate, and his administrators and heirs being unable to perform the contract for want of personal assets, entered into an agreement with the defendants, by which the latter covenanted and agreed "that they would take up and cancel" the contract made between *Champion* and *Storrs* and *Paddock*, or in case *Champion*, the survivor of *Storrs*, should refuse to give up and cancel the contract, they would indemnify and save harmless the administrators of *Paddock* from all damage, &c. The contract sought to be enforced was simply the covenant to indemnify. The defendants demurred to the bill, but the Court overruled the demurrer, remarking that the administrators were, upon the facts stated in the bill, entitled to a specific performance of [*494] the covenants on the part of the *defendants, and to an assessment of damages for the breach thereof.

We can not distinguish the cases of *Ranelaugh v. Hayes*, and *Champion et al. v. Brown et al.*, from the case under consideration. The complaint here, as in the cases cited, wants the thing in specie for which he contracted; he wants the cloud which overhangs him removed, and it is in the power of a Court of equity to do it.

It matters not that the contract in this case is in the form of a bond with a condition. The form of the instrument by which the contract appears, is wholly unimportant. A Court of equity only seeks to be satisfied that the transaction in substance amounts to, and is intended to be, a binding agreement for a specific object. If the contract appears only in the condition of a bond secured by a penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance, even if he should offer to pay the penalty. 2 Story's Eq., 22, 53.

Davis v. The State, on the Relation of Hughes.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. L. Jernegan, J. W. Chapman, and A. L. Osborne, for the plaintiff.

J. B. Niles, for the defendants.

DAVIS v. THE STATE, on the Relation of HUGHES.

BASTARDY—EFFECT OF DISCHARGE BY JUSTICE.—A person charged before a justice of the peace with being the father of an illegitimate child, was, on examination of the mother, discharged by the justice. *Held*, that the discharge was no bar to a subsequent prosecution for the same offense.

ERROR to the Warren Circuit Court.

SULLIVAN, J.—This was a case of bastardy. The plaintiff in error was recognized to appear in the Circuit Court by *William Harrington*, a justice of the peace, to answer to the complaint of the relator. He appeared and pleaded, 1, Not guilty; 2, That on, &c., and before the birth of the child named in the complaint, the said *Catharine Hughes*, the relator, made complaint before one *J. M. Wilson*, a justice of [*495] the peace of Warren county that she was then pregnant with a child, which, when born, would be a bastard; that he, the said *Davis*, was the father of it; that he was thereupon arrested and taken before said justice, and the complainant was duly examined upon her oath, and upon said examination it was made to appear that he, the said *Davis*, was not the father of said child, and he was thereupon discharged, &c. The plea contained the usual averments of identity, &c. The second plea, on motion of the prosecuting attorney, was rejected by the Court, and the defendant excepted. The cause was tried by a jury. Verdict and judgment against the defendant.

The rejection of the second plea is the only error complained of.

The facts stated in the rejected plea constitute no bar to this proceeding. On a complaint of bastardy being made to a justice of the peace, it is the duty of the justice to investigate the charge, and if it shall be made to appear that the defendant is the father of the child, and he refuses to pay to the mother such sum of money, &c., as she may agree to receive, and to indemnify the county against the support of the child, to recognize him to appear and answer to the charge before the Circuit Court. If he is not proved to be the father of the child, the justice should discharge him; but the statute does not authorize him to acquit him of the charge. In the Circuit Court, a trial is had on the merits of the complaint. A former acquittal, to be sufficient as a bar to a subsequent suit or prosecution for the same matter, must be a legal discharge by judgment on trial. 1 Chitt. Cr. Law, 457. A judgment of the Circuit Court, therefore, in a case of this kind, where the merits are tried, would, so long as it remained unreversed, be a bar to a subsequent suit. But the refusal of a justice to recognize after he has examined the complainant is no trial of the merits, and consequently no bar.

Per Curiam.—The judgment is affirmed, with costs.

R. A. Chandler, for the plaintiff.

A. A. Hammond, for the State.

[*496] *MCINTIRE and Wife v. YOUNG.

WITNESS, IMPEACHMENT OF.—Before the credit of a witness can be impeached by showing that he had made a previous statement inconsistent with his testimony, he must be asked whether he had made such statement.

SAME.—And if the statement be relevant to the issue, and the witness deny having made it, it may be proved.

SAME.—But if the statement be not relevant to the issue, the witness can not be questioned respecting it; nor can he be contradicted if he deny having made it.

SLANDER—EVIDENCE.—Actionable words not laid in a declaration in slander, having reference to the slander complained of, may, though spoken after the commencement of the suit, be proved to show malice in the defendant.

McIntire and Wife v. Young.

SAME -- *Quære*, whether if the malicious intention be not equivocal, such evidence is admissible.

SAME--PRACTICE.--The admission of such evidence offered by the plaintiff after the defendant had closed his testimony will not be adjudged erroneous merely on account of the time when it was introduced.

NEW TRIAL.—A new trial is never granted on account of newly discovered evidence, when by diligence, the party might have previously had the benefit of the evidence.

SAME.—And such trial is rarely, if ever, granted on account of newly discovered evidence, if the only object of the evidence be to impeach the character of a witness.(a)

ERROR to the *Jefferson* Circuit Court.

DEWEY, J.—Slander against husband and wife for words spoken by the latter imputing a want of chastity to the plaintiff below, who was an unmarried woman. Plea, not guilty. Verdict for the plaintiff, \$1,000, and judgment accordingly. Motion for a new trial overruled.

On the trial, the plaintiff proved, by the deposition of a witness, the speaking of the slanderous words, as laid in the declaration. The witness having established that fact, added, in her examination in chief, that she was not acquainted with the plaintiff at the time the slander was uttered, and that she told the defendant who spoke the words that she (the witness) knew nothing about the matter. She also, afterwards, in her examination in chief, stated that on becoming acquainted with the plaintiff a short time after the defamatory charge was made, she formed an opinion of her character very different from the impression which the slander had made upon her mind. The defendants offered to prove that the witness had herself, previously to the conversation in which she said she had heard the slanderous words from one of the de-
[*497] fendants *made the same charge against the plaintiff contained in those words. The plaintiff objected to the testimony and it was rejected. This is assigned as error.

It is contended that the evidence was admissible for the purpose of impeaching the witness.

It is a general rule of law, that when the credit of a witness

(a) See cases cited in *Jackson v. Sharpe*, 29 Ind., 170.

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is attempted to be impeached by showing that he had made a previous statement inconsistent with his testimony, he must be first questioned as to whether he made such a statement, in order to give him an opportunity of showing it was made, if made at all, in such a manner and under such circumstances as not to militate against the credibility of his testimony; then, if the subject-matter of the previous statement be relevant to the issue, and the witness deny having made it, it may be proved for the purpose of impeaching his credit. But if it be in regard to a matter collateral and foreign to the merits of the cause on trial, the witness can not, with propriety, be questioned as to whether he made it, nor contradicted if he deny it. 1 Stark. Ev., pp. 134, 135; 3 Id., 1755; *Spencely v. De Willott*, 7 East, 108; *Harris v. Tippet*, 2 Camp., 637; *Rex v. Watson*, 2 Stark. R., 116; *The Queen's case*, 2 B. & B., 298; *Doe d. Sutton v. Reagan*, 5 Blackf., 217, and note.

Admitting the statement, which the defendants offered to prove the witness had made in regard to the plaintiff, was relevant to the cause, we do not think a sufficient foundation was laid for the admission of the testimony. No question in reference to the supposed statement was asked the witness, nor does it appear that her attention was in any manner turned to the subject. She had no opportunity to explain the statement if made. We can easily conceive that it was susceptible of such an explanation as to render it compatible with the fairness of her testimony. At least the supposition is very possible; and she should, therefore, have had an opportunity of making the attempt. In the *Queen's case* before quoted, the question arose whether, when a witness who had been examined in chief on the part of the plaintiff, and who having been asked if he remembered a quarrel between two persons, answered that he did not remember it, but who had not been

asked on his cross-examination if he had made a
 [*498] *certain declaration respecting such quarrel, it was competent for the defendant, in order to prove that the witness must remember the quarrel, to introduce testimony that he did make such declaration? It was decided that it

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was not competent; and the decision rested expressly on the ground that the witness had not been questioned as to his previous declaration, and had no opportunity to make such explanation as might have been in his power. This is a strong case, and fully sustains us in the position that the defendants, in failing to question the witness as to any previous statement made by her, failed to lay a sufficient foundation on which to impeach her testimony.

But, in our opinion, the statement of the witness proposed to be proved was entirely collateral to the merits of the cause. The issue was whether one of the defendants had uttered certain slanderous words against the plaintiff. That the witness had uttered the same words could have no bearing upon that question in any point of view. It could not possibly prove that the defendant did or did not speak the words, nor could it affect the consequences of speaking them. The defendants, therefore, would have had no right to contradict the witness even had she been questioned, and had denied making the statement. The evidence was correctly rejected.

After the defendants had closed their testimony, the plaintiff offered to prove, for the purpose of showing malice, that the same defendant who uttered the slanderous words laid in the declaration, said, after the commencement of the suit, that "she had reason to suspect the virtue of the plaintiff, and she would so state in Court." The defendants objected to the testimony, but it was admitted. This is also urged as error.

It is contended that the evidence was illegal, because the words being actionable might be the foundation of another suit; and because it was too late after the defendants had closed their testimony for the plaintiff to introduce such proof. Actionable words not laid in the declaration, having a reference to the slander complained of, though uttered after the commencement of the suit, may be given in evidence to show the malice of the plaintiff, but not to increase the

[*499] damages. **McGlemery v. Keller*, 3 Blackf., 488; *Chubb v. Westley*, 6 C. & P., 436; *Finnerty v. Tipper*, 2 Camp., 72. It is, however, questionable whether, in any

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case where the malicious intention of the defendant in speaking or publishing the words laid in the declaration is not equivocal the plaintiff may prove other words for the purpose of showing malice ; there is the authority of Lord *Ellenborough*, on one occasion, that he can not. *Stuart v. Lovell*, 2 Stark. R., 93. As the record in this cause does not contain all the evidence which was given, there is nothing to show that, at the close of the defendant's testimony, it was not doubtful with what intention the defendant spoke the words complained of ; we can not, therefore, admitting the decision in *Stuart v. Lovell* to be law, say that the subsequent words were not properly admitted to establish the malice of the defendant.

With regard to the objection to this testimony on account of the time at which it was introduced, that was so much a matter of discretion with the Circuit Court under a view of all the circumstances of the case, that we are not authorized to pronounce its admission to be erroneous. 1 Stark. Ev., 150. Besides, if the defendant's testimony had rendered the intention with which the words laid in the declaration were spoken doubtful, the rebutting evidence of the plaintiff was introduced on the earliest opportunity. He could not, in that case, have adduced it until after the defendants had closed their proof.

It is contended, also, that the Circuit Court erred in refusing a new trial.

The motion for a new trial was founded upon the allegation of newly discovered testimony. *McIntire*, one of the defendants, made his affidavit stating that he had been informed during the trial that one of the witnesses, who proved the slanderous words, had formerly lived at *Rockport* in *Spencer* county in this State, where she bore a very bad character ; that she had eloped from her husband, who had procured a divorce from her ; that after the divorce she had changed her name and lived a wandering life ; that she had clandestinely taken from her former husband her daughter, who was the only other witness that swore to the speaking of the slanderous words ; that she had also changed her daughter's name,

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[*500] *and exercised unbounded control over her ; and that he learned these facts too late to make proof of them at the trial. The defendants also produced the affidavit of one *Hinds*, who had communicated the above information to *McIntire*. *Hinds* deposed that about six months before the date of his affidavit he visited *Rockport*, where he received from hearsay the information which he had communicated to *McIntire* ; and he was also informed that the witness was guilty of illicit intercourse with several men.

We do not think the Circuit Court committed an error in refusing a new trial on these affidavits. To mention no other, there are two fatal objections to their sufficiency. The first is, that they do not show diligence. The deposition of the witness whose character was sought to be impeached, was taken a year before the trial. The defendants were aware of the important nature of her testimony, yet they took no steps in all that time to inquire into her character. New trials are never granted on the ground of newly discovered evidence, when, by diligence, the desired testimony might have been ready at the trial. *Coe v. Givan*, 1 Blackf., 367. The other objection is, that the only object of the newly discovered testimony was to impeach the character of a witness. New trials are rarely, if ever, granted for such a purpose. *Bunn v. Hoyt*, 3 Johns., 255 ; *Shumway v. Fowler*, 4 Id., 425 ; *Duryee v. Dennison*, 5 Id., 248.

It is also said that the damages are excessive. But we see nothing in the record to convince us that the jury grossly misjudged on that subject.

Per Curiam.—The judgment is affirmed with one *per cent.* damages and costs.

C. Cushing and *S. C. Stevens*, for the plaintiffs.

J. Morrison, for the defendant.

GOODLET v. BRITTON.

MERCANTILE PAPER.—In a suit under the statute of 1839 against *A*, the maker, and *B*, the indorser, of a promissory note payable at bank on a certain day, a count, to be valid, must show a good cause of action against each of the defendants.

[*501] SAME—INDORSER.—*A count in such suit, as respects the indorser, should aver a demand at the bank on the maker when the note fell due, and notice of his default to the indorser.

SAME.—A suit under said statute must be brought against all the makers and indorsers living; and the plaintiff must recover, if at all, against all the defendants served with process, unless where there is a plea by one or more of them showing a personal discharge.

ERROR to the *Spencer* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit commenced by *Britton* against *J. R. E. Goodlet* and *William M. Hammond*. The first three counts charge *Goodlet* as the maker, and *Hammond* as the indorser, of a promissory note negotiable and payable at the *Evansville* branch bank, 120 days after date. The fourth count is for money paid for the defendants and on an account stated. The second and third counts were demurred to and the demurrers sustained. *Hammond* pleaded several pleas; but the proceedings as to him were enjoined by an order of the Court of chancery. *Goodlet* pleaded non assumpsit. The issue between the plaintiff and *Goodlet* was tried by the Court, and judgment rendered against *Goodlet*.

The demurrers to the second and third counts were correctly sustained. The suit is brought, under the statute of 1839, against *Goodlet*, the maker, and *Hammond*, the indorser of the note; and a count in such case to be valid should show a good cause of action against each of the defendants. Neither of these counts avers a demand of payment on the maker at the bank when the note fell due, and notice of his default to the indorser; and they are, therefore, bad on general demurrer. By the statute of 1836, an averment of a demand on the maker at the place was not necessary in the counts as to him; but the statute does not apply to a suit against the indorser. R. S., 1838, p. 462; *Hartwell et al. v. Candler*, 5 Blackf., 215.

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We are next to inquire whether, under the circumstances, the plaintiff could take judgment against the maker of the note alone? If the suit is to be governed by the rule established in other cases against two defendants sued on contract, there is no difficulty in this question. That it is to be so governed appears from what is said in the case of *Dillon et al. v. The State Bank of Indiana*, November term, [*502] 1841. *That rule is, that in such suit, process being served on both defendants, the plaintiff must recover, if at all, against both, except where one pleads some plea that goes to his personal discharge. 1 Will. Saund., 207, note 2; *Shields v. Perkins*, 2 Bibb. 227.

We consider, that the holder of such a note as the one before us, may proceed against the maker and indorsers jointly, under the statute of 1839, if he have a good cause of action against each of them, but not otherwise. When he has such grounds of suit, and chooses to proceed under the statute, his action must be brought against all the makers and indorsers living, and the judgment for the plaintiff, if any, must be rendered against all sued and served with process, with the single exception which has been already mentioned.

According to this doctrine, the judgment in this case against *Goodlet* alone is erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Stevens, for the plaintiff.

LATHROP v. THE STATE.

SCHOOL COMMISSIONER—INDICTMENT.—A school commissioner may be indicted for a breach of duty; but the indictment, to be valid, must show the condition of his bond to be broken. And the breach in such case ought to be so particularly assigned, that the assignment would, were it in a declaration in a suit on the bond, be beyond the reach of a special demurrer.

SAME.—An indictment against such commissioner for failing to make a report to the county auditor of the moneys received and disbursed by, &c., should contain an express averment that money had been received by the defendant which he was bound to report.

ERROR to the *Crawford* Circuit Court.

BLACKFORD, J.—This was an indictment against *Lathrop* for not discharging his duty as school commissioner of *Crawford* county. The indictment states that the defendant, on, &c., was school commissioner, &c., and not regarding his duty as such commissioner, he neglected and refused, on, &c., to make a detailed report to the auditor of the county of all moneys received and disbursed by him as such [*503] *commissioner, specifying from what source received and to whom paid over and when, together with the separate accounts of each township over which he had jurisdiction, showing the amount of principal and interest distributed to each township; to the evil example, &c. Plea, not guilty, and judgment for the State.

The statute requires each school commissioner to take an oath of office, and give bond conditioned for the faithful discharge of his duties. It is made his duty to keep a separate account of the funds belonging to each congressional township within his jurisdiction, and of his transactions in relation to the same; and in keeping such account to distinguish the sums received as principal from those received as interest. It is also made his duty on, &c., in every year, to make a detailed report to the county auditor of all moneys received and disbursed, specifying from what source received, and to whom and when paid over, stating separately the accounts of each township over which he may have jurisdiction, and showing the amount of principal lent out and to whom, &c., and the amount of interest distributed to each township, &c. Acts of 1841, pp. 51, 52. It is also provided by statute that whenever any officer of known to the constitution or laws of the State, from whom an oath and bond of office are required, may be knowingly guilty of any act or omission which shall amount to a breach of his official bond, he shall be deemed guilty of malfeasance in office, and upon conviction thereof shall be fined, &c. Acts of 1841, p. 185.

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According to these statutory provisions, a school commissioner may be indicted for a breach of duty ; but the indictment, to be valid, must show the condition of his bond to have been broken. And the breach in such case ought to be so particularly assigned, that the assignment would, were it in a declaration in a suit on the bond, be beyond the reach of a special demurrer ; it being necessary to the validity of an indictment, that it be good in form as well as in substance. 1 Chitt. Cr. Law, 172.

In the indictment before us, the statement relied on to show a breach of the condition of the bond is that the defendant had failed to make a report, to the county auditor, of the moneys received and disbursed by him, with [*504] the accounts *of the townships, showing the money distributed to each of them, &c. But this statement in a declaration, in a suit on the bond setting out the condition, would not show a sufficient breach on special demurrer, because there is no express averment that any money had been received by the commissioner concerning which he was bound to report. In the analogous cases of *Serra et al. v. Wright*, 6 Taunt., 45, and *Ewing v. Coddington*, 5 Blackf., 433, such an averment was considered necessary on special demurrer ; and in the cases of *The Postmaster-General v. Cochran*, 2 Johns. R., 413, and *Hughes v. Smith*, 5 Johns. R., 168, on bonds conditioned to pay over money that should be received, &c., the declarations expressly aver the receipt of money, &c.

The indictment under consideration not expressly alleging that the defendant had received any money, can not be supported.

Per Curiam.—The judgment is reversed. To be certified, &c.

J. Pitcher, for the plaintiff.

J. Lockhart, for the State.

Chapman v. Woods.

CHAPMAN v. WOODS.

MALICIOUS PROSECUTION.—If in an action for maliciously indicting the plaintiff, &c., it appear that a *nolle prosequi* to the indictment had been entered, and a judgment thereupon rendered that the defendant “go hence, thereof acquit, without day,” the acquittal is sufficient to warrant the suit.(a)

CHANGE OF VENUE.—When a change of venue is awarded in open Court, an entry on the record directing the change, and ordering the clerk to transmit the papers, is a substantial compliance with the statute.

ERROR to the *Marion* Circuit Court.

SULLIVAN, J.—This was an action for a malicious prosecution brought by *Woods* against *Chapman*. The suit was commenced in the *Hancock* Circuit Court, and transferred by change of venue to the *Marion* Circuit Court. The cause of action, as set forth in the declaration, is that on, &c., the said *Chapman*, without any reasonable or probable cause whatever, caused and procured *Woods* to be indicted in the [*505] **Hancock* Circuit Court for perjury, &c. Plea, not guilty. Verdict and judgment for the plaintiff.

At the trial, the plaintiff introduced the records of the *Hancock* Circuit Court, and proved by them that an indictment had been preferred against him as alleged in his declaration. It was also proved by the same records, that, at the same term at which the bill was found, a *nolle prosequi* was entered to the indictment by the prosecuting attorney; whereupon the Court rendered the following judgment, viz., “It is therefore considered that the said defendant as to said indictment go hence, thereof acquit, without day.” The evidence showing the agency of *Chapman* in procuring the indictment, the want of probable cause, &c., is not spread upon the record. The Court was asked by the defendant to instruct the jury, that the entering a *nolle prosequi* to an indictment by the prosecuting attorney, is not such an acquittal as is necessary to maintain the action of malicious prosecution. The Court refused the instruction asked, and instructed the jury that the evidence

(a) See *Hays v. Blizzard*, 30 Ind., 457.

offered was sufficient to prove that the plaintiff had been prosecuted, and that the prosecution was ended. Other instructions were asked and refused, but no error, as it respects them, is complained of.

The instruction refused and those given present for our consideration the question, whether, a *nolle prosequi* entered to an indictment, together with a judgment of the Court discharging the defendant therefrom, is such a termination of the prosecution as will support this action?

There is no doubt but that to support the action, it must be shown that the prosecution is determined. All the authorities concur on this point. And perhaps it is equally true, that the entry of a *nolle prosequi* by the prosecuting attorney, without any judgment of the Court discharging the defendant from the indictment, is not regarded as such a termination. In *Goddard v. Smith*, 3 Salk., 245, which was an action for a malicious prosecution upon an indictment for barratry, to which a *nolle prosequi* had been entered by the attorney general, it was held that the prosecution was not determined. The reason given was, that upon the same indictment new process might be taken out. In the same case it was said by the Court, [*506] that the termination of the *prosecution must be by an acquittal on the merits of the case, but this does not seem to be necessary. *Chambers v. Robinson*, 2 Strange, 691; *Wicks v. Fentham et al.*, 4 T. R., 247. If it be shown that the original prosecution, wherever instituted, is at an end, it will be sufficient. *Fisher v. Brestow et al.*, 1 Doug., 215, and note. Is the prosecution to which reference is made in this case at an end? We answer it is. Although a new indictment may be preferred against the defendant, new process can not issue upon the former indictment. The judgment of the Court puts an end to further proceedings against the defendant upon it. Where a man is maliciously indicted he may not be able to obtain a trial on the merits, if the prosecuting attorney is determined to, and actually does, *nol. pros.* the indictment. It is therefore not unreasonable that he should, in that event, ask for and obtain a judgment of the Court discharging him

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from further answering to the indictment ; and in such a case, if no action lies, an innocent man may be harrassed without the hope of redress. We are therefore of opinion, that the Court did not err in admitting the records of the *Hancock* Circuit Court as evidence that the original prosecution was determined ; and that there was no error in the instructions given to the jury.

Another error assigned is, the refusal of the Court to strike the cause from the docket of the *Marion* Circuit Court for want of jurisdiction. At the first term after the papers were filed in the *Marion* Circuit Court, the defendant moved the Court to strike the cause from the docket, and remand the papers to the *Hancock* Circuit Court, because it did not appear that the judges of the *Hancock* Circuit Court had awarded a change of venue in the case "under their hands," nor that said judges had ordered the Clerk of the *Hancock* Circuit Court to transmit the papers to the clerk of the *Marion* Circuit Court, and because the expenses attending the removal of the papers to the latter Court had not been paid. It is admitted that all the papers that belonged to the cause, were delivered by the clerk of the *Hancock* Circuit Court to the plaintiff in the suit, who delivered them safely to the clerk of the *Marion* Circuit Court. The motion was properly overruled. If a change of venue be ordered by a judge in vacation, it is necessary that the change be "awarded [*507] under his *hand ;" and that he order the clerk of the

Court, before which the suit is pending, to send forward the papers to such Court as he may direct. A written order from the judge in such cases is, under the circumstances, the only record that can be made of his determination. But when the change is awarded in open Court, as was done in this case, an entry upon the records of the Court directing the change, and ordering the clerk to transmit the papers, is a substantial compliance with the statute. As to the remaining reason, that is, that the costs of removal were not paid by the party applying for the change, we think it unnecessary to inquire whether it were sufficient, if true, to oust the *Marion*

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Circuit Court of jurisdiction. There was no evidence offered of its truth, and the Court very properly disregarded it.

Per Curiam.—The judgment is affirmed with costs.

W. W. Wick and *L. Barbour*, for the plaintiff.

W. Quarles and *P. Sweetser*, for the defendant.

KENDALL v. HALL, on Appeal.

THE judgment of the Circuit Court will not be reversed on the weight of evidence, if the evidence be contradictory.

On a trial of the right of property taken in execution, the claimant can not give in evidence the declarations of the execution-debtor, the latter being a competent witness for the former. *Hankins v. Ingols*, 4 Blackf., 35.

WILSON v. STANTON.

The second indorser of an accommodation note, is not liable for contribution to the first indorser who has paid the note.

ERROR to the Wayne Circuit Court.

DEWEY, J.—*Stanton* sued *Wilson* in **assumpsit for money** had and received. **Plea, the general issue.** Trial by the Court.

Judgment for the plaintiff.

[*508] *The evidence shows a series of bank transactions, in which *Wilson* was originally a second indorser for the accommodation of *Stanton*. During the progress of the business, in consequence of an arrangement between *Stanton* and one *Fleming*, the latter became the maker of several renewed notes for a part of the original debt. *Stanton* was the payee and first indorser, and *Wilson* the second indorser, of these notes. It does not appear at whose solicitation, or under what circumstances, *Wilson* placed his name upon the notes,

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except that he knew their nature and object. The last in the series of renewed notes *Stanton* paid. The Circuit Court, viewing the relation between *Stanton* and *Wilson* to be that of joint sureties for *Fleming*, considered *Wilson* liable to contribution to *Stanton*, and rendered a judgment against him for half the amount paid by *Stanton*.

We can not take this view of the matter. Had the note taken up by *Stanton* been what is called business paper, regularly transferred by *Stanton* to *Wilson* and by him to the bank, there would not be the slightest doubt as to the rights and liabilities of the respective parties. Each indorser would have placed his name upon the note, knowing that he thereby rendered himself conditionally liable to every subsequent holder, and that he had his recourse against every antecedent party, for the whole amount which he might be obliged to pay. Contribution would have been out of the question. Is there any reason why the same principles should not be applied to accommodation paper? We see none. When a man is requested to place his name upon such paper, the object is to give it additional credit. He complies or refuses, as he judges compliance to be safe or unsafe; and this he does in reference to the security which the instrument already possesses. At least, this is the fair presumption in the absence of all explanatory evidence. This subject was brought directly before the Supreme Judicial Court of *Massachusetts*, in *Church v. Barlow*, 9 Pick., 547; and it was decided that there was no distinction between the rights and liabilities of indorsers of business and accommodation paper; and that the second indorser of the latter, who had paid the money due, could not sue the first indorser for contribution. And such is our conclusion, [*509] viewing the accommodation indorser merely *as such. See, also, *Hixon v. Reed*, 2 Litt., 174; *Wells v. Jackson*, November term; 1841.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

C. B. Smith, for the defendant.

Wilson v. Black.

WILSON v. BLACK.

BLANK INDORSEMENT OF NOTE.—The legal effect of a blank indorsement of a promissory note, transferred in a regular course of business, can not be controlled by parol evidence that the indorsement was without recourse.^(a)

SAME—PLEADING.—In assumpsit by the assignee against the assignor of a promissory note, a special plea denying the assignment is bad on special demurrer as amounting to the general issue.

ERROR to the *Wayne Circuit Court*.

DEWEY, J.—Assumpsit by *Wilson* against *Black*. The declaration contains two counts. The first is on a promissory note made by one *Fleming* to the defendant, and by him indorsed in full and without qualification to the plaintiff. The insolvency of *Fleming* is alleged. The second count is for money had and received. Pleas, the general issue to the whole declaration, and two special pleas to the first count. The first special plea is, that the indorsement of the note by the defendant to the plaintiff was originally in blank; that at the time of making the indorsement, and as a part of the contract of transfer, it was agreed between the parties, that the plaintiff should take the note without the right of recourse on the defendant, if the money could not be collected of the maker. The second special plea is a virtual denial of the assignment of the note. All the pleas are verified by oath. The plaintiff demurred to the special pleas, and assigned for cause of demurrer, that they severally amounted to the general issue. The Court overruled the demurrer to the first plea, and sustained that to the second. Final judgment was then rendered for the defendant without any proceedings under the general issue.

The only question of any importance in this cause [*510] arises *from the demurrer to the first special plea. It is this, can the legal effect of a blank indorsement of a note, made in the regular course of business, be qualified and controlled by a cotemporaneous verbal agreement.

This Court has decided, that an unqualified assignment in

(a) *Campbell v. Robbins*, 29 Ind., 271; 8 Id., 417; 7 Id., 496.

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full of a note could not be controlled by parol proof of an agreement that the assignment was without recourse. *Odam v. Beard*, 1 Blackf., 191. This decision is fully sustained by the following *English* authorities: *Hoare et al. v. Graham et al.*, 3 Camp., 57; *Goupy et al. v. Harden et al.*, 7 Taunt., 159; *Free v. Hawkins*, 8 Taunt., 92; *Britten et al. v. Webb*, 2 B. & C., 483. The only difference between those cases and this is, that in them the indorsements were in full, and here the indorsement was originally in blank. But this is a difference in form only. The liability of an indorser under both modes of transfer is precisely the same—to pay the note if, after due diligence, it can not be collected of the maker. This liability is not expressed in terms in a full indorsement any more than it is in a blank one; it is an implication of law arising from each; it is the legal effect of a written contract consisting both of the note and the indorsement, and can not, in our opinion, in either case, be varied or qualified by a parol agreement simultaneous with the indorsement. See *Barry v. Morse*, 3 New Hamp. R., 132. The demurrer should have been sustained.

The decision of the demurrer to the second special plea was right. That plea, according to *Bates v. Hunt*, 1 Blackf., 67, and *Scribner v. Bullitt*, Id., 112, was defective as amounting to the general issue.

An irregularity occurred in entering final judgment for the defendant on the decision of the demurrer to the first special plea; the second count in the declaration was overlooked.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiff.

C. H. Test, for the defendant.

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*VANSLYKE v. GILMORE.

PLEADING.—An account consisting of various items was filed as a cause of action against A before a justice of the peace. Plea in abatement, that the

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promises, if any, were made jointly with *B*. *Held*, that proof that one of the articles was on the joint account of the defendant and *B* sustained the plea.^(a)

ERROR to the *Greene* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit commenced before a justice of the peace on an account consisting of various items, viz., for cash lent, for boots, corn, freight of chickens, &c. Plea in abatement, that the promises, if any, were made jointly with one *John Barker*, &c. Replication, that the promises were made by the defendant alone. Judgment for the defendant. On appeal, the issue was submitted to the Court, and judgment rendered for the defendant.

It being proved on the trial that one of the items in the account, viz., for the freight of chickens, was chargeable to the defendant and *Barker* jointly, and not to the defendant alone, the Court stopped the plaintiff from introducing proof of the other items, and gave judgment for the defendant.

There is a case in point to show that one of the articles being on the joint account of the defendant and *Barker*, the defendant was well warranted in the plea he had pleaded. *Colson et al. v. Selby*, 1 Esp. R., 452.

Per Curiam.—The judgment is affirmed with costs.

C. P. Hester, for the plaintiff.

J. S. Watts, for the defendant.

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MECHANICS' LIEN.—A person can not avail himself of the benefit of the statute giving mechanics a lien on buildings, who has not commenced his suit within a year, &c., and filed in the recorder's office due notice, &c., as the statute requires.

WORK AND LABOR.—Where a person seeks to recover, as on a *quantum meruit*, the value of work done, materials furnished, &c., his remedy, if he have any, is not in chancery, but at law.

(a) *Bond v. Wagner*, 28 Id., 462.

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[*512] *APPEAL from the *Decatur* Circuit Court.

SULLIVAN, J.—*R. and R. Springer* filed a bill in chancery against *McKinney* on a contract by which they undertook to find the materials and build a house for the latter in the town of *Greensburg*. The bill states that, by the terms of the contract, the complainants were to erect the house on a certain foundation then prepared for it, which *McKinney* represented to be fifty by thirty-two feet, and they were to complete the building on or before the 1st of *August*, 1838; in consideration of which, *McKinney* was to convey to them, by a good and sufficient warranty deed, on or before the said 1st of *August*, 1838, a lot of ground, with the improvements, &c., in the same town of *Greensburg*. He agreed also to put them into immediate possession of the same, which the bill admits was accordingly done. It states that, at the time the contract was entered into, *McKinney* falsely and fraudulently represented to the complainants that he had a good and unincumbered title to the lot so to be conveyed for their labour and materials, when in truth his title was not clear, but was incumbered with heavy judgments; that they erected the walls of said building, inclosed the same, and did a great portion of the carpenter's work before they were informed of the incumbrances upon said lot; that they expended a large sum of money in and about said building, and did not stop the work until it became generally known in *Greensburg* that *McKinney* had no good title to said lot, and they had reason to believe that he would not be able to comply with his contract, or in any way to pay them for their labour and materials; that having expended all their capital, &c., they were not able further to employ workmen, &c., and were unable to complete said building within the time specified in the contract; that they were deceived by *McKinney* in the size of the foundation of said house, the same being considerably larger than was represented by him. The bill further states that after the 1st of *August*, 1838, the day on which the building was to have been completed, the complainants procured the means of prosecuting the work, and, by and with the consent of *McKinney*, proceeded to finish the same, and would

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have completed the building if he had not prevented them; that they are ready and willing to complete it, and [*513] *have repeatedly offered to do so, but *McKinney* refuses, &c.; that he has commenced an action of ejectment against them in the *Decatur* Circuit Court, to recover the possession of the lot which was to have been conveyed to them as aforesaid, &c. The prayer of the bill is, that the complainants may have a lien on the building erected by them for the amount of their labour and materials, and for general relief; and that defendant be enjoined from proceeding in his action of ejectment.

A demurrer to the bill was overruled, whereupon the defendant answered. The answer admitted the special contract as set forth, but denied every other material allegation in the bill. It avers that the defendant has a good title to said lot, &c.; that complainants of their own wrong and without any good cause abandoned the work and failed to perform their contract; it denies that complainants worked on said building after the 1st of *August*, 1838, with defendant's consent, &c.

The facts of the case are spread upon the record in the form of a special verdict, found by a jury impaneled by consent of parties. They are substantially as follows, viz.: That the title to the lot of ground, which was to be conveyed by *McKinney* to the complainants for their labour and materials, was in *McKinney* on the 1st of *August*, 1838, but that it was incumbered with judgments against him as charged; that the work done and materials found by the complainants for the defendant were worth \$1,352.17, but that the building was not completed by the complainants on the 1st of *August*, 1838, according to the terms of the contract; and that it was the fault of the complainants, and "of their own wrong," that it was not completed; and that *McKinney* sustained damage to the amount of \$45 by the failure; that the materials used in the building were not of the quality required by the contract; and that the work was not done in a workman-like manner, nor according to the contract; and that it would require \$625 to finish the building. The jury further found that the foun-

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dation, on which the building was erected, was larger than *McKinney* represented it to be; and that the complainants did perform work on the building, *after [*514] the time specified for its completion, with his knowledge and consent.

On a subsequent day depositions were taken, which went further to prove that the complainants worked on the building, with the defendant's consent, after the 1st of *August*, 1838; and that the work was stopped by his interference on account of the imperfection of the workmanship.

The Court decreed that the complainants had a lien on the lot named in the contract, and directed the same to be sold; that \$1,200 be paid to complainants, &c. From that decree the defendant appealed to this Court.

We do not think it necessary to discuss the merits of the controversy between the parties at this time; indeed, we think it would be premature to do so. A preliminary question presents itself; and that is, whether the complainants' case is such that they are entitled to relief in a Court of chancery?

If it be said that this bill was filed under the act "giving to mechanics a lien upon buildings," R. S., 1838, p, 412, it may be replied that the requisites of that statute, such for example as commencing the suit within one year, or filing in the recorder's office of the county due notice of the intention of the complainants to hold a lien upon the building, were not complied with; and that, therefore, they are not entitled to the remedy given by that statute. But the bill was not placed on the statute at the hearing in the Circuit Court, nor is it attempted to be maintained here as coming within its provisions.

We do not perceive any ground upon which a Court of chancery can grant relief to the complainants on the facts of this case. If they were justifiable in discontinuing operations on the building previously to the 1st of *August*, 1838, from a belief that the lot which they were to receive in payment of their services was incumbered in the hands of the defendant, or that he could not make to them a good title for it at the

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time named in the contract, a Court of law is competent to give them ample remuneration for their labour and materials. Their right to discontinue, if they had such a right, depends upon fixed, legal principles, and which Courts of law are known every day to recognize and assert.

[*515] Or, if *the building was not completed at the day named, and the parties, either expressly or impliedly, waived the time at which it was to be completed, and the complainants proceeded with the work after the day, by and with the consent of the defendant, and were prevented from completing it by the act of the defendant, a Court of law is also competent to afford an adequate remedy. But if the complainants failed entirely to fulfil their part of the contract without any fault on the part of the defendant, and the contract remains in full force, we know of no principle which will enable them to obtain, in a Court of chancery, that which is denied them in a Court of law.

The question in this case is one of a purely legal character, and depends for its settlement upon well established principles of law. There is nothing in the case that requires the interposition of a Court of chancery. It is not a bill for a specific performance, nor is it a bill to rescind the contract; on the contrary, it seeks to recover from the defendant the value of the work done by the complainants, in the nature of a *quantum meruit*. When a cause depends entirely on the solution of a legal question, the proper tribunal for the determination of that question is a Court of law.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

T. A. Howard and *P. Sweetser*, for the appellant.

G. H. Dunn and *J. Dumont* for the appellees.

The State, on the Relation of Hays, v. Hook.

THE STATE, on the Relation of HAYS, v. HOOK.

JURISDICTION OF JUSTICE.—In a suit by the State, on the relation, &c., on a justice's bond, the breach assigned was, that the justice had rendered judgment in an action of debt in favour of the relator against one *R.* for \$95.87 and costs; that the justice had improperly taken replevin-bail, &c., and neglected to issue execution, &c. *Held*, that the declaration sufficiently showed that the justice had jurisdiction of the suit against *R.*, it appearing that the action was debt, and the amount recovered less than \$100.

ERROR to the *Bartholomew* Circuit Court.

SULLIVAN, J.—Debt on the official bond of a justice of the peace. The suit was commenced against the defendant [*516] and *two others. Process was served on the defendant, and as to the others returned "not found."

The declaration sets out the bond and condition which are in the usual form, and assigns as a breach, that on the 1st of *May*, 1841, at, &c., the defendant being a justice of the peace, entered a judgment against one *H. B. Rowland* in favour of *Hays*, the relator, in an action of debt, for the sum of \$95.87 and costs of suit; that on the 22d of *June*, 1841, the judgment being in full force, &c., and the said *H. B. Rowland* being the owner within the county of personal property, not exempt from execution, more than sufficient to pay and satisfy said judgment, the defendant, *Hook*, being still such justice, &c., did, for the purpose of injuring and defrauding *Hays*, take, receive, and approve of one *George H. Rowland* as replevin-bail for the stay and execution on said judgment; that said *G. H. Rowland* was, at the time he was so received and approved of as replevin-bail, insolvent, and that the defendant knew it; that defendant, as such justice, neglected to issue execution on the judgment until the 9th of *October* following, at which time *H. B. Rowland* had become insolvent, and that he so continues, and the said *G. H. Rowland* continues to be wholly insolvent, &c. There was a general demurrer to the declaration which was sustained by the Court, and judgment was rendered for the defendant.

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The alleged defect in the declaration, on account of which the demurrer was sustained, is, that it does not contain an averment that the justice had jurisdiction of the case in favour of *Hays* against *H B Rowland*; and it is argued that if he had not jurisdiction, he can not be made liable for taking insufficient bail.

Without stopping to inquire to what extent the objection, if true, would avail the defendant under the circumstances, we are of opinion that the declaration does sufficiently show that the justice had jurisdiction in the case referred to. It is shown to have been an action of debt, and that the sum recovered was less than \$100. It is true, as was urged in the argument, that the suit may have been commenced on a demand for more than \$100, but we will not so presume. Indeed, we would rather presume that if the original demand exceeded \$100, it [517] had been reduced by credits *to an amount less than that sum. *Remington v. Henry*, November term, 1841. We think the principle involved in this case was considered in the case of *Perkins v. Smith*, 4 Blackf., 299, and decided against the view now taken by the defendant.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod, for the State.

A. A. Hammond. for the defendant.

PICHON v. MCHENRY.

CHANCERY JURISDICTION.—The decision of a Court of law, made in the due exercise of its jurisdiction, can not be revised by a Court of chancery.

DISMISSAL OF APPEAL.—If a party be aggrieved by a decision of the Circuit Court in dismissing an appeal from a justice's judgment, the amount in controversy in the appeal dismissed not being less than \$20.00, exclusive of interest and costs, his only remedy is by appeal or writ of error to the Supreme Court.

INJUNCTION.—A judgment at law, in a suit on an appeal-bond, can not be enjoined by a Court of chancery for the want or failure of consideration of the bond.

Pichon v. McHenry.

ERROR to the *Allen* Circuit Court.

DEWEY, J.—*McHenry* filed his bill in chancery, setting forth that *Pichon* had sued him before a justice of the peace in trespass, and had recovered a judgment against him for \$20.00 and costs; that he appealed to the Circuit Court, where *Pichon* moved to dismiss the appeal, alleging a defect in the appeal-bond; that *McHenry* was allowed one day by the Court, in which to file a new appeal-bond; that it being inconvenient for him to file it so soon, on account of the absence of his surety, he did not file it until five days afterwards, when it was received and approved by the Court; that the only defect in the first bond was, that it bore date in 1838 instead of 1839; that the new bond was the old one with the date corrected; that *Pichon's* counsel was present when the new bond was filed, knew the fact, and made no objection; that at the succeeding term, the Court, on *Pichon's* motion, dismissed the appeal on the ground that the new appeal-bond was not filed within the time originally allowed for that purpose; that *McHenry* had a good defense against the action; that he filed an affidavit of merits, and moved the *Court to reinstate the appeal, which was refused; that after the appeal was dismissed, *Pichon* commenced a suit at law on the new appeal-bond against the surety of *McHenry* and recovered judgment. The prayer of the bill is, that the judgment at law be enjoined, and the appeal reinstated. The associate judges granted a temporary injunction in vacation. *Pichon* moved the Court to dissolve the injunction and dismiss the bill; the motion was overruled. On the motion of *McHenry*, the complainant, the Court decreed a perpetual injunction against the judgment at law, reinstated the appeal, and gave judgment against *Pichon* for costs.

This decree can not be sustained. That part of it which reinstated the appeal was an attempt by a Court of equity to revise a decision of a Court of law, made in the due exercise of its jurisdiction, for an alleged error in a matter of law. This, allowing an error to have been committed, is inadmissible. Besides, the complainant had a full and complete

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remedy at law. The amount in controversy in the appeal dismissed, not being less than \$20.00 exclusive of interest and costs, was sufficient to give this Court jurisdiction either on appeal, or by writ of error. The error of the Circuit Court in dismissing the appeal might have been corrected by this Court. This was the remedy which the complainant was bound to pursue, if he considered himself aggrieved by the decision of the Circuit Court.

The defense against the action on the appeal-bond, if any existed, was also at law. It consisted in a want or failure of consideration, which is made a legal defense by statute. No circumstance of fraud is alleged; and the bill contains no matter of equitable jurisdiction.

The motion to dissolve the injunction should have prevailed. The motion to dismiss the bill was not strictly regular. A demurrer would have been the more correct practice; but as the manner of objecting to the bill was acquiesced in below, it is now a matter of no consequence.

Per Curtam.—The decree is reversed with costs. Cause remanded, &c.

D. H. Colerick and *W. H. Coombs*, for the plaintiff.

H. Cooper, for the defendant

[*519] *THE STATE, on the relation of HEWITT and Others,
v. GUARD and Others.

FAILURE TO RETURN WRIT—EXCUSE.—In debt on a sheriff's bond; the breach assigned was the sheriff's failure to return a certain *feri facias*. Plea, that on the return day of the execution, and for six days before, the sheriff was sick, and thereby rendered incapable of returning the writ, or of attending to the duties of his office, and so continued until his death. *Held*, that the plea was good.

ERROR to the Dearborn Circuit Court.

DEWEY, J.—This is an action of debt founded on the offi-

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cial bond of one *Weaver*, sheriff of *Dearborn* county, who was dead at the commencement of the suit. The action is against his sureties, in the name of the State, on the relation of *Hewitt* and others. The bond is conditioned for the faithful discharge by *Weaver* of the duties of his office, &c. The breach assigned is, that *Weaver* did not return a certain writ of *feri facias*, which had been placed in his hands by the relators. The defendants, among other pleas, pleaded, That on the return day of the execution, and for six days previous thereto, *Weaver* "was sick of fever and confined to his bed, and thereby rendered incapable of returning said writ, or of attending to the business or duties of his office;" and so continued until several days after the return day, and until his death. General demurrer to this plea overruled, and final judgment for the defendants.

A sheriff failing to return an execution on or before the return day thereof, is liable to an action against himself and sureties on his bond, and to a judgment for the full amount of the execution, with ten *per cent.* thereon, and costs, unless he show cause satisfactory to the Court, why such judgment should not be rendered. R. S., 1838, p. 286.

The question is whether the plea exhibits that cause.

The general rule of law is, that when a legal duty is devolved upon a public officer, and it becomes impossible through the act of God to perform it, the officer is excused. The breach of the bond complained of is the failure of the officer in his duty in not returning an execution. The excuse alleged by his sureties is, that he was rendered incapable of performing that, or any other duty, by sickness. The demurrer admits [*520] the truth of the excuse. The officer was, *consequently, not only unable to return the writ himself, but he was not able to appoint a deputy, or if he already had one, to transfer the writ to him. If the sheriff was not disabled in the manner, or to the extent alleged, the plea should have been denied. We think the defendants have shown a satisfactory cause why the severe judgment, prescribed by the statute, should not be rendered against them.

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Per Curiam.—The judgment is affirmed with costs

D. Macy, for the plaintiff.

J. Ryman and *P. L. Spooner*, for the defendants.

HANNA v. STEINBERGER and Others.

RIGHT OF PROPERTY.—There may be a trial of the right of property on which an execution has been levied, under the statute of 1838 regulating trials of the right of property, though the value of the goods exceed \$100.(a)

LEVY OF U. S. MARSHAL—LIABILITY.—If a marshal levy an execution of a Federal Court on the goods of a stranger to the execution, he violates the laws of the State, and may be sued in its Courts by the injured party, in trespass or trover, for the damages sustained.

SAME—REPLEVIN.—The owner of the goods may also, in such case, sustain an action of replevin against the marshal; or he may file his claim to the goods before a justice of the peace, and have the right of property tried under the above-named statute.

ERROR to the *Tippecanoe* Circuit Court.

BLACKFORD, J.—An execution from the *United States* Circuit Court for the District of *Indiana*, in favour of *Steinberger* and others against *Sherry* and others, was levied on certain goods in the possession of the execution-defendants. *Hanna*, the plaintiff in error, filed a claim to the goods before a justice of the peace. The execution-plaintiffs and the marshal appeared before the justice, and moved to dismiss the suit for want of jurisdiction. The motion was overruled. Issue was then joined, the cause tried, and judgment rendered for the claimant, the goods being found to be worth \$1,350. The defendants appealed to the Circuit Court; and on their motion that Court dismissed the suit, on the ground that the justice had no jurisdiction of it.

The dismissal of the suit is attempted to be sustained on two grounds: 1, Because the value of the goods exceeded [4521] ing *\$100, was beyond the justice's jurisdiction;

(a) See *Griffin v. Malony*, 13 Ind., 402.

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2, Because the execution was from a Court of the *United States*.

The first objection is unfounded. The statute is general, "that whenever one or more executions shall be levied on any personal property of any person, &c., he may file with any justice, &c., a claim in writing," &c.; and there is no intimation that the trial can not take place, if the value of the goods exceed \$100. R. S., 1838, p. 490.

The second objection requires more consideration. It appears to us, that when the marshal levies an execution of a Federal Court on property belonging to a stranger to the execution, he acts without any authority, and the levy must be void. He, in that case, violates the laws of the State, and may be sued in its Courts by the injured party, in trespass or trover, for the damages sustained. The question whether he is liable, under these circumstances, in replevin, or to any other action by which the goods are taken out of his custody, must, we suppose, be the same in principle as if the suit were merely for damages on account of the taking or detention of the property. The language of *Kent* on this subject is as follows: "If the officer of the *United States* who seizes, or the Court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal Courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the *United States*, under an execution in favour of the *United States* against *A*, should seize the person or property of *B*, then the State Courts have jurisdiction to protect the person and the property so illegally invaded; and it is to be observed, that the jurisdiction of the State Court in *Rhode Island*, was admitted by the Supreme Court of the *United States* in *Slocum v. Mayberry*, upon that very ground." 1 *Kent's Comm.*, 410. It follows, we think, from the doctrine contained in that extract, which we consider correct, that the decision of the Circuit Court in this case is erroneous. The case of *Slocum v. Mayberry*, referred to by *Kent*, was this: The surveyor of the customs of a port in *Rhode Island*, under the directions of

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the collector, had seized a vessel and cargo on suspicion of an intention to violate the embargo laws then in [*522] force. *The owner of the *cargo*, after a demand and refusal, brought an action of replevin against the surveyor in the State Court, and recovered. In error, the Supreme Court of the *United States* said, that it was the vessel only, and not the cargo, that was the object of the act of Congress; that the owner had the same right to his cargo that he had to any other property, and might exercise over it every act of ownership not prohibited by law; and that as the suit was brought for property, to detain which the law gave no authority, it was triable in the State Court. 2 Wheat., 1.

The seizure of the *vessel* mentioned in the case of *Slocum v. Mayberry*, stood upon ground different from that upon which the detention of the *cargo* stood. The seizure and detention of the vessel were by virtue of an act of Congress, and a suit for the seizure or detention could not be sustained in the State Court. The reason is obvious. The act of Congress authorized, under certain circumstances, the seizure and detention of the vessel; and the vessel, when seized, was within the jurisdiction of the Federal Court. The question, then, whether the grounds of the seizure were valid or not, was to be decided by the Court within whose jurisdiction the vessel was; that is, by the Federal not a State Court. But there was no act of Congress authorizing the marshal, under any circumstances, to detain the cargo from the owner of it after a demand. The cargo, therefore, was not within the jurisdiction of the *United States* Court, and an action of replevin for it could be brought in a State Court.

In the case under consideration, the ground of the complaint is, not that the marshal had improperly exercised his authority in the taking or detaining of goods authorized, under certain circumstances, to be taken or detained by him by virtue of an act of Congress; but that he had not, *under any circumstances*, a right to take or detain the goods in question; that is, that he had levied the execution on goods belonging, not to the execution-defendants or any of them, but to the

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claimant. There seems, therefore, to be the same reason for sustaining an action of replevin in a State Court, on the facts assumed in the case before us, as there was for sustaining it in such Court for the cargo, on the facts existing in *Slocum v. Mayberry*.

[*523] *Believing as we do, and as the above-cited case proves, that replevin might have been brought in the State Court for the goods in question, there seems to be no good reason why the present suit should not also lie in such Court. There is no doubt that if our statute, by giving this suit to try the right of property, merely regulates the mode of proceeding on executions, as the defendants contend, it can have no effect relative to an execution issued by a *United States* Court, as the statute has not been adopted by an act of Congress, or by the Federal Court under the authority of such act. *Wayman v. Southard*, 10 Wheat., 1. But this statute was not designed to regulate the mode of proceeding on executions; on the contrary, its only object and effect are to give an additional remedy for the recovery of the possession of goods in a case to which it applies; and the proceeding it authorizes must be considered as standing on the same ground with the action of replevin, except that it requires for its support the additional evidence that the goods were taken under colour of an execution. R. S., 1838, p. 490.

We consider, therefore, that it was necessary for the defendants in this case, as it would have been in replevin, in order to support their objection to the jurisdiction of the State Court, to prove that the goods, by the levy of the execution, were within the jurisdiction of the Federal Court; and this, as we have endeavoured to show, they failed to do.

We think, for these reasons, that the Circuit Court committed an error in dismissing the suit for want of jurisdiction in the justice.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Z. Baird, for the plaintiff.

R. A. Lockwood, for the defendants.

Noel and Another v. The State, on the Relation, &c.

NOEL and Another v. THE STATE, on the Relation, &c.

PLEADING.—A plea of *nil debet* to an action of debt on a bond is bad on general demurrer.

SAME.—In a suit on a justice's bond for neglecting to issue an execution, a plea that at the time of the judgment and ever since the execution-defendant was insolvent, is insufficient.

[*524] INSOLVENCY OF EXECUTION-DEFENDANT.—*But in such suit, the execution-defendant's insolvency at the time of the judgment and afterwards may be proved in mitigation of damages.

ERROR to the *Allen* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State on the official bond of a justice of the peace. The following breaches were assigned in the declaration: 1, That the relators obtained a judgment in 1838, before the justice against one *Laughlin* for the sum of, &c., on which no stay of execution was taken; that the justice failed to issue execution for three months, during which time *Laughlin* had sufficient goods, &c.; and that no execution was issued until his property was disposed of. 2, That the relators obtained another judgment against *Laughlin* before the justice, &c.; that after the return of *nulla bona* to a *fi. fa.* on the judgment, the relators ordered a *ca. sa.*, &c.; but that the justice neglected and had continued to neglect to issue it; whereby *Laughlin* was suffered to go out of the jurisdiction, &c.

There were five pleas: 1, *Nil debet*. 2, To the first breach, that at the time of the judgment, and ever since, *Laughlin* was insolvent, and had no goods subject to execution. 3, To the second breach, that at the time of the judgment, and when the *ca. sa.* is alleged to have been ordered, and ever since, *Laughlin* was insolvent, and had no goods subject to execution. 4, To the first breach, that at the time of the judgment, one of the relators ordered the justice to suspend the issuing of execution, &c. 5, To the second breach, that no *ca. sa.* was ever ordered to be issued until after *Laughlin* had absconded.

General demurrers to the first three pleas, and the demurrers sustained.

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Replication in denial of the fourth plea, and issue; and issue on the fifth plea.

The defendants, on the trial, offered to prove in mitigation of damages, that, at the time the judgment was rendered, and till the time of the trial, *Laughlin* was wholly insolvent; but the Court refused to admit the evidence.

Verdict in favour of the plaintiff for \$76.40, and judgment accordingly.

The first plea was bad. *Love v. Kidwell*, 4 Blackf., 553.

The second and third pleas were bad also. They [*525] contain *no justification for the breach of duty alleged in the declaration.

The rejection of the evidence offered by the defendants in mitigation of damages was wrong. It was for the jury to determine what damage the relators had sustained by the neglect of the justice to issue the executions; and it is not probable that they would have considered his loss so great on account of the justice's default, if *Laughlin* was insolvent, as if he had been in good circumstances.

Per Curiam.—The judgment is reversed at the costs of the relators. Cause remanded, &c.

T. Johnson, for the plaintiffs.

W. H. Coombs, for the defendant.

JAMES v. THE LAWRENCEBURGH INSURANCE COMPANY.

FRAUD.—Debt by the assignee of the payee of a promissory note against the maker. Plea, that the note was given in part consideration of a tract of land sold and conveyed by the payee to the defendant, of which the former falsely and fraudulently represented himself to be seised; that the payee, at the time of the sale, had no title to the land; and that the defendant had not taken possession, &c. *Held*, that the plea was good.(a)

PLEADING.—If to a plea of former recovery, the plaintiff reply that the causes of action are not the same, the issue is for a jury.

(a) *Stephens v. Evans*, 30 Ind., 39; *Mix v. Ellsworth*, 5 Ind., 517.

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ERROR to the *Dearborn* Circuit Court.

SULLIVAN, J.—Debt on a promissory note executed by the plaintiff in error, *James*, to one *Tate*, and by the latter indorsed to the *Lawrenceburgh Insurance Company*. There were five pleas pleaded. Issues on the first, second, third, and fifth, which were tried by a jury, and verdict rendered for the plaintiff. To the fourth plea a general demurrer was filed. That plea alleges, that the note sued on was given in part consideration of a tract of land which the payee, *Tate*, at the time of the making thereof, pretended to sell and convey to the defendant, and which he then and there falsely and fraudulently pretended to be seised and possessed of with lawful power to sell and convey, when in truth and in fact the said *Tate*, at the time of the sale and conveyance, and at the time of making said representations, had no title to the land, nor right to *sell and convey it; that defendant, therefore, had not taken possession of said land, &c., wherefore, &c. The Court sustained the demurrer, and final judgment was given for the plaintiff.

The plea alleges, that the consideration of the note sued on was a tract of land which the vendor, who is the assignor of the plaintiff, at the time the note was given, pretended that he was the owner of, and had a right to sell and convey, when in truth he had no title to the land and no right to sell it. His representations are alleged to be false and fraudulent; and the defendant on the discovery of the imposition, refused to take possession of the land. We think the plea is a good defense to the action. We have heretofore decided, that such a defense would be good to an action against the purchaser of real estate to which the vendor had no title, on a bond executed by him for the purchase-money, where no conveyance had been made of the land pretended to be sold. *Bryan v. Blythe*, 4 Blackf., 249; *Leonard v. Bates*, 1 Id., 172. In the cases referred to, there was no consideration for the promise, and it was held not to be binding. The same principle, we think, must govern this case. The case of *Frisbee v. Hoffnagle*, 11 J. R., 50, is in point. There the suit was upon a note, the consideration of

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which was a piece of land conveyed by the payee to the maker of the note by deed with warranty, and, at the time of the conveyance, there was a judgment against the payee, under which the land was afterwards sold on an execution against him. In an action by the payee against the maker of the note, it was held that the suit could not be maintained, as the consideration of the note had wholly failed, the title of the maker of the note being extinguished by the sale under the judgment, though he had not yet been evicted by the purchaser, for he was liable to be evicted, and was responsible to him for the mesne profits. We are therefore of opinion that the Court erred in sustaining the demurrer. If, as in *Post v. Shirley*, 5 Blackf., 430, the vendor had been possessed of a good title to the land, the case would be different.

The plaintiff in error further contends, that the Court erred in submitting the issue on the fifth plea to a jury. That was a plea of former recovery. The replication was, [*527] that the *plaintiff had not impleaded the defendant, &c., for the non-payment of the same identical debt, &c., and had not recovered, &c. The plaintiff in error, in support of his position, refers us to the case of *White v. Elkin*, May term, 1842, but that case does not sustain him. The plea in that case was *nul tiel record*, which we decided could not be tried by a jury, but must be determined by the Court. In this case the plaintiff, very prudently perhaps, did not reply *nul tiel record*, but denied that the debt for which the two suits were brought was identical. This raised the inquiry whether the same cause of action had been before litigated, and being a matter *in pais*, was properly triable by a jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman and *P. L. Spooner*, for the plaintiff.

D. Macy, for the defendant.

Allen v. Smith.

ALLEN v. SMITH.

DISSEISIN.—In disseisin, as in ejectment, the legal title must prevail.

ADVERSE POSSESSION.—A person in possession of real estate under a bond conditioned for a title on payment of the purchase-money, has not such an adverse possession as will invalidate a conveyance made by the owner, during such possession, to a third person.(a)

NOTICE TO QUIT.—A notice to quit is not necessary in an action of disseisin, if there be no privity between the parties.

APPEAL from the *Marion* Circuit Court.

SULLIVAN, J.—Disseisin by *Smith* against *Allen*, and judgment for the plaintiff. The evidence of the plaintiff was objected to by the defendant, but the objection was overruled. The defendant excepted, and spread the evidence on the record.

The chain of title introduced by the plaintiff was, 1, A patent from the *United States* to *John Smock* for one of the tracts of land sued for; 2, A patent from the *United States* to said *Smock* and *John Cutler* for the remaining tract; 3, A deed from *Cutler* to the heirs of *John Smock* for the equal undivided half of the last-mentioned tract of land; 4, A deed for both [*528] tracts from *Smock's* heirs to the plaintiff. It *appeared in evidence that one *Ogle*, on the 9th of *October*, 1832, having no title whatever to the land, conveyed it to one *Carson*, who conveyed it, on the 26th of *October*, 1841, to *Smith*, the plaintiff below. *Allen*, at the time of the conveyance to *Smith* from *Carson*, as well as at the date of the deed from *Smock's* heirs to *Smith*, was in possession by virtue of a purchase from *Carson*, as an evidence of which he held the title-bond of *Carson*, by which the latter obligated himself to make a deed to *Allen* so soon as he should pay the purchase-money. It was proved that *John Smock* was in the possession of the land at the time of his death, and that *Allen*, at the date of the conveyance from *Smock's* heirs to *Smith*, was in possession by virtue of his purchase from *Carson*. The suit was com-

(a) *Mix v. Ellsworth*, 5 Ind., 517.

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menced on the 14th of *November*, 1842, and a notice to quit was served on the 12th of *January*, 1842.

In the action of disseisin, as in the action of ejectment, the legal title must prevail; and if there be no valid objection to the title of *Smith*, the judgment of the Circuit Court should be affirmed.

In the first place, the deed from *Smock's* heirs to *Smith* is said to be void, on the ground that *Allen* was in adverse possession of the premises at the time of the purchase by *Smith*, and at the date of his deed. This objection is not well founded. A possession and claim of land under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance. Instruments which do not purport to convey title, can not be the foundation of an adverse possession. *Jackson d. Swartwout v. Johnson*, 5 Cowen, 74; *The Proprietors, &c., v. McFarland*, 12 Mass. R., 325; *Higginbotham v. Fishback*, 1 Marsh. (Ky.) Rep., 506; *Kirk et al. v. Smith*, 9 Wheat., 288. A contrary opinion was expressed by the Chancellor of *New York*, in the case of *La Frombois v. Jackson*, in the Court of Errors, 8 Cowen, 589, 597, but it was the only opinion expressed as to the effect of a claim of equitable title as a foundation of an adverse possession. The point was not adjudicated in that case. According to all the adjudged cases, the colour and claim of title in cases of adverse possession, however defective it may be, must be a colour and claim of *legal* title, and not a mere *equity*.

[*529] *On the trial, the defendant objected to the introduction of the deed from *Carson* to *Smith* because its execution was not duly proved. It is not at all necessary in this case to examine the defendant's objections to the admissibility of the deed. The plaintiff's title is complete without that deed, and the defendant holds no title from *Carson* which can avail him in this action. Admitting, therefore, that the proof of the execution of that deed was insufficient, it can not affect the merits of this case.

From the view we have taken of the case, there was no

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privity of contract or estate between the plaintiff and the defendant, and notice to quit was not necessary. *Bowser v. Warren*, 4 Blackf., 522.

Per Curiam.—The judgment is affirmed with costs.

W. Quarles, P. Sweetser, and H. O'Neal, for the appellant.

H. Brown, W. W. Wick, and L. Barbour, for the appellee.

DOTY v. THE STATE.

CHANGE OF VENUE.—If an indictment be found in the Circuit Court of one county and be tried in the Circuit Court of another—the record not showing a change of venue, nor that any objection was made to the jurisdiction of the latter Court—a change of venue will be presumed.

CRIMINAL LAW—VERDICT.—A verdict of guilty of petit larceny, disfranchising the defendant, from holding any “office of trust” is valid, and authorizes a judgment disfranchising him from holding any “office of trust or profit.”

ERROR to the *LaGrange* Circuit Court.

DEWEY, J.—This was an indictment for larceny found in the *Steuben* Circuit Court. The defendant below was tried in the *LaGrange* Circuit Court, and found guilty of petit larceny. The verdict, among other things, disfranchised the prisoner from holding any “office of trust.” The judgment founded on that part of the verdict was that he be disfranchised from holding any “office of trust or profit.”

The record does not show how the cause was transferred from the *Steuben* to the *LaGrange* Circuit Court, nor does it show that any objection was made to the jurisdiction of the latter Court.

[*530] *The errors assigned are, 1, That the *LaGrange* Circuit Court had no right to try the cause; and, 2, That the verdict was not authorized by law, nor the judgment by the verdict.

Neither of these objections can prevail. In the case of *Bosley v. Farquar et al.*, 2 Blackf., 61, it was held that a cause

Dawson v. Shirley.

commenced in one Circuit Court could be legally tried in another, the record showing neither a change of venue nor an objection urged to the jurisdiction of the Court which tried the cause; and that it was too late to urge the want of jurisdiction, for the first time, in this Court. We perceive no substantial difference between that case and the cause under consideration. The circumstance that one was a civil action and the other a criminal suit can make no difference, because the right to change the venue is common to both, and because neither could be legally tried in the Court taking cognizance of it without a regular change of venue, had an objection to the jurisdiction been made. In the absence of such an objection, a change of venue must be presumed.

The law prescribes as a part of the punishment on a conviction of petit larceny that the culprit be "disfranchised and rendered incapable of holding any office of trust or profit" for a determinate period, to be found by the jury. R. S., 1838, p. 208. The objection urged against this verdict is that it disfranchises only in reference to offices of "trust," being silent as to those of "profit." We conceive the objection to be merely verbal. All offices of *profit* are necessarily offices of *trust*; and must therefore be included in those of the latter description. We think the verdict complies substantially with the law; and that it authorized the judgment rendered by the Court.

Per Curiam.—The judgment is affirmed with costs.

W. H. Coombs, for the plaintiff.

A. A. Hammond, for the State.

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CONVEYANCE BY ATTORNEY.—A vendee of real estate is not obliged to receive a conveyance executed by an attorney in fact, unless where there is some very strong reason for it.

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ACKNOWLEDGMENT OF FEME COVERT.—A *feme covert* can not acknowledge a conveyance of real estate by an attorney in fact.(a)

ERROR to the *Allen Circuit Court*.

DEWEY, J.—Debt by *Shirley* against *Dawson*. One count in the declaration is founded upon a promissory note made by the defendant to the plaintiff. Among other pleas, the defendant pleaded, that the note was given for the price of certain town lots purchased by him of the plaintiff; that at the time of making the note, the plaintiff executed his bond, conditioned for the execution and delivery, by him to the defendant, of a good deed for the lots when the note should be paid; and that the plaintiff had never delivered, or offered to deliver, such a deed to the defendant. The plaintiff replied that he did, on, &c., tender to the defendant a good and sufficient deed for the lots, executed by himself and one *Jabez Goodell* and *Diadama Goodell* his wife. Rejoinder in denial, and issue. The cause was submitted to the Court. Judgment for the plaintiff. Motion for a new trial overruled.

On the trial, the plaintiff gave in evidence the note declared on, and proved that he tendered to the defendant a deed purporting to be executed by the plaintiff, and by *Goodell* and his wife by the plaintiff as their attorney in fact, conveying the lots in fee-simple to the defendant. The deed appeared to have been acknowledged in *Ohio* before the mayor of a town, by the plaintiff in person, and by *Goodell* and wife by the plaintiff as their attorney in fact. There was a certificate of the presiding judge of the proper Court to the official character of the mayor, and that he was authorized by the laws of *Ohio* to take acknowledgment of deeds, &c. The defendant refused to receive the deed on account of the manner of its execution. This was all the evidence.

We can not sustain the decision of the Circuit Court. There was no evidence of the execution of the deed, at least so far as *Goodell* and his wife were concerned.

[*532] *But had the deed been duly executed by them

(a) *Woods v. Polhemus*, 8 Ind., 60.

Dawson v. Shirley.

by attorney (if that could be done), the defendant had a right to reject it. A purchaser is not bound to receive a deed executed by attorney, unless there is some very strong reason for it. That mode of execution multiplies his proofs if he has occasion to support his title, for he is obliged to prove the execution of the power, as well as of the deed; and he may be embarrassed by the loss or destruction of the power, or it may be revoked by the death of the principal before its execution by the agent. 1 Sugd. on Vend., 451; *Mitchel v. Neale*, 2 Ves., 679; *Cooke v. Callaway*, 1 Esp., 115; *Richards v. Barton*, Id., 268.

There is another objection to the deed in question. It appears to have been executed out of the State, and to be acknowledged before the mayor of a town. That officer is not among those authorized by our statute to take the acknowledgment of deeds in another State; but if he could be viewed as possessing the powers of a justice of the peace, and, therefore, as having the requisite authority, still the deed is inoperative as to *Mrs. Goodell*. It does not convey her interest in the lots. A married woman, by the common law, can alien her real estate only by fine and recovery. Our statute authorizes her to sell it by joining with her husband in a deed, and by acknowledging before the proper officer, after having been by him examined separate and apart from her husband, and after having its contents made known to her by the officer, that she did voluntarily seal and deliver the deed as her free act, without coercion from her husband. R. S., 1838, p. 313. Whether she can, in conjunction with her husband, appoint an attorney to execute a deed in her name, we need not now inquire. She certainly can not acknowledge a deed by an attorney, because that mode of acknowledgment does not admit of her examination, by the officer taking it, in the manner prescribed; and her conveyance, being entirely statutory, is not binding upon her, unless it is acknowledged agreeably to the provisions of the statute. 16 Johns., 116.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. Johnson, for the plaintiff.

Doe, on the Demise of Crawle and Others, v. Bates and Wife.

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*FINCH v. THE STATE.

INDICTMENT.—The day and year when an offense is charged in an indictment to have been committed, should be expressed in the indictment in words at length and not in figures.(a)

SAME.—Indictments are not within the operation of the statutes of amendment.

ERROR to the *Union Circuit Court*.

BLACKFORD, J.—Indictment against *Finch* for knowingly suffering his horse to be run in a horse race along a public highway. Plea, not guilty, and judgment for the State.

The indictment in this case is defective, as the day of the month and the year when the offense is alleged to have been committed, are expressed in figures and not in words at length. This seems to be a slight objection, but the law on the subject is believed to be settled. 1 Chitt. Crim Law, 176. Indictments are not within the operation of the statutes of amendments. Id., 297.

Per Curiam.—The judgment is reversed. To be certified, &c.

S. W. Parker and *J. B. Sleeth*, for the plaintiff.

A. A. Hammond, for the State.

DOE, on the Demise of CRAWLE and Others, v. BATES and Wife.

BASTARD—ESCHEAT.—According to the common law, if a bastard die intestate and without issue, leaving real estate, the estate escheats.

SAME—INHERITANCE.—The 8th section of the statute of 1831, regulating descents, enables a bastard to inherit property that descends through his mother; but it does not enable his mother, brothers, or sisters, to inherit from him.

(a) *Hampton v. The State*, 8 Ind., 336.

Doe, on the Demise of Crawle and Others, v. Bates and Wife.

SAME.—By the 6th section of said statute, if a bastard die intestate and without issue, leaving a widow, she shall inherit his real estate.

ERROR to the *Shelby* Circuit Court.

BLACKFORD, J.—This was an action of ejectment on the several demises of *Mary Anne Crawle*, *John Kinds* and wife, and *John Kamper* and wife. Plea, not guilty, and judgment for the defendants.

The record shows the following facts: In *August*, 1838, one *William Crawle* died seised in fee-simple of the [*534] land *described in the declaration, having purchased it of the *United States*. He was the bastard son of *Mary Anne Crawle*, one of the lessors of the plaintiff, and left living, at the time of his death, his mother, and his wife *Susan Crawle*. After his birth, his mother married one *Foley* (who was not the bastard's father), by whom she had two daughters, one of whom married *Kinds*, one of the lessors of the plaintiff; and the other married *Kamper*, another of the lessors. *William Crawle* left no other relatives; and his widow, who after his death married the defendant *Bates*, never had any children. He was never recognized by *Foley* as his son. The defendants were in possession of the premises, and had notice to quit. It further appears, by the written arguments of the parties, that the said *William Crawle* died intestate.

The question to be decided in this case is, did the real estate of the intestate descend to his mother, brothers and sisters, or to his widow?

According to the common law, *William Crawle* being a bastard, and dying intestate and without issue, the land in dispute would escheat to the State. By that law, at least so far as inheritances are concerned, the intestate was the son of nobody, and could not have any legal heirs but of his own body. 1 *Blacks. Comm.*, 459; *Chitty on Descents*, 27; 1 *Preston on Estates*, 468; 2 *Kent's Comm.*, 212. The common law on the subject is in force here, and must govern the question before us, except so far as it has been changed by statute. The only statutory provisions, which are supposed

Doe, on the Demise of Crawle and Others, v. Bates and Wife.

by either of the parties to have any thing to do with their claims are the following sections in the statute of 1831 regulating descents:

Sect. 2. If there be no children, nor their descendants, then (the estate of a person dying **intestate** shall descend) to the father; and if there be no father, then in equal parts to the mother, brothers, and sisters, of such deceased person dying **intestate**, and to their descendants.

Sect. 6. When for want of issue of the intestate, and of father or mother, brothers or sisters, or their descendants, the estate as before directed to descend in equal parts to the paternal and maternal kindred, shall, for want of such kindred, go to the wife.

[*535] *Sect. 8. There shall be no difference between legitimate and illegitimate children, in the inheriting of property that descends to them through the mother. R. C., 1831, p. 208.

There is nothing in these statutory provisions that can benefit the claim in this case of the mother, brothers, or sisters of the intestate. Their reliance is on the second and eighth sections, but they do not support their claim. As those persons are not, in the contemplation of the common law, related as respects inheritances to the bastard, they can not inherit the land under the second section of the statute, unless they are aided by the eighth section. But that section has no application to them whatever. It enables a bastard to inherit property that descends to him through his mother; but it is silent as to any right of his mother, brothers, or sisters to inherit from him. It leaves their claims where it found them—to be governed by the common law, by which, as we have already shown, they are without foundation.

The defendants contend that the land, under the sixth section of the statute, descended to the intestate's widow, who is one of the defendants; and we think it did. As the intestate died without issue, and, according to the common law—he being a bastard—without father or mother, brothers or sisters, or their descendants, and without paternal or maternal kindred,

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the widow is entitled to the land in question under this sixth section of the statute.

Per Curiam.—The judgment is affirmed at the costs of the lessors.

W. J. Peaslee, for the plaintiff.

S. Major, for the defendants.

CROCKER v. DUNKIN.

NE EXEAT.—A writ of *ne exeat* should be made returnable to the first day of the term next after it issues.

ERROR to the *Fountain* Circuit Court.

SULLIVAN, J.—The complainant in the Court below, *Dunkin*, on bill filed, sued out a writ of *ne exeat* against *Crocker*, by which, among other things, the sheriff was commanded to *summon the defendant to appear before the judges of the *Fountain* Circuit Court on the first day of the next term of said Court, to be holden at, &c., on the third *Monday* of *September*, 1841, to answer, &c. The bill was filed and the writ issued on the 17th of *March*, 1841. The session of the *Fountain* Circuit Court, next after issuing the writ of *ne exeat*, was required by law to be held on the *Monday* next succeeding the Court in the county of *Warren*, that is, on the second *Monday* of *September*, 1841. The Court accordingly was opened on that day, and on the first day of the term, *Chandler*, as *amicus curiæ*, moved the Court to quash the writ because it was not made returnable to the first day of the term next after it issued; but the Court overruled the motion. The defendant not answering, a decree *pro confesso* was entered against him.

Several errors are relied upon for the reversal of the judgment, but the only one that can avail the plaintiff in error is the refusal of the Court to quash the writ. The statute requires all writs to be made returnable to the first day of the

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term next after they are issued. The writ in this case was made returnable to a day beyond the next term. A term thus intervened between the teste and the return day of the writ, and in such case it has been held that the writ is void. *Shirley v. Hagar*, 3 Blackf., 225; *Burk v. Barnard*, 4 J. R., 309; *Reubel v. Preston*, 5 East., 291. The court, therefore, should have sustained the motion to quash the writ.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Jenners and *R. A. Chandler*, for the plaintiff.

R. C. Gregory, for the defendant.

KELSEY v. ROSS and Others.

DUE DILIGENCE.—Assumpsit by the assignee against the assignor for a promissory note, assigned after it became due. *Held*, that a delay of seven days after the assignment, in commencing suit against the maker, was not, of itself, sufficient evidence of the want of due diligence. (a)

NON-SUIT.—A party who voluntarily suffers a non-suit as to one count, can not complain of any error in the proceedings under that count.

[*537] *ERROR to the *Tippecanoe* Circuit Court.

SULLIVAN, J.—Assumpsit by the assignee against the assignors of a promissory note. The declaration contained two counts. The first count states that on the 20th of *January*, 1837, one *M. Johnson* made her promissory note payable to the defendants by the name of *D. Ross* and Co., ninety days after date, for the sum of \$84.22, and that the defendants on the 24th of *November*, 1837, assigned the same to the plaintiff, and one *Brown* since deceased, by the name of *Brown* and *Kelsey*; that on the 1st of *December*, 1837, *Brown* and *Kelsey*, commenced a suit against *Johnson* on said note before a justice of the peace, and obtained a judgment on the 2d of *January*, 1838, on which judgment execution was issued on the 6th of

(a) *Craft v. Dodd*, 15 Ind., 380; 9 Ind., 572.

January, 1838, and returned *nulla bona*. It further alleges that said *Johnson* had not on the last-mentioned day, nor at any time since, any goods or chattels, lands or tenements, from which the money could be levied. The second count sets out the making of the note and the assignment as in the first count, and the death of *Brown*, and then alleges that the maker, *Johnson*, was, at the time the note became due, wholly and notoriously insolvent, &c.

The defendants demurred to the first count, and pleaded the general issue to the second. The demurrer was sustained, and, upon the trial of the issue on the second count, the plaintiff suffered a nonsuit.

The objection taken to the first count was, that due diligence had not been used by the assignees in prosecuting the maker of the note to insolvency. The note was assigned on the 24th of *November*, and on the 1st of *December*, seven days after the assignment was made, suit was commenced. The delay in commencing the suit is the ground relied on, no objection being made to the prosecution of it with proper diligence, after it was commenced, to judgment and execution. Due diligence is a matter partly of law and partly of fact. Under some circumstances, a delay of seven days might be considered gross negligence, while in other circumstances it would not be so considered. In the case of *Merriman v. Maple*, 2 Blackf., 350, the assignee delayed commencing suit, after the note fell due, from the 8th of *August* until the 19th [*538] *of *September* following. The *capias* that was then issued was returned *non est inventus*, which occasioned a continuance and a delay in obtaining final judgment until the *March* following. Under those circumstances, negligence was imputed to the assignee; but if the writ had been served, and the defendant brought into Court at the first term, the assignor, notwithstanding the delay, could not have complained of a want of diligence. This case is referred to to illustrate the remark, that delay in commencing a suit may, under some circumstances, be considered negligent, while under other circumstances it will not. We

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see nothing in the circumstances of the case under consideration, to justify us in saying that the delay of a week in commencing suit against *Johnson*, was such a want of reasonable diligence as to be fatal to the plaintiff's right to recover. Indeed, we think they lead to a different conclusion. The note, at the time of the assignment, was over due more than nine months, and when it came into the hands of the assignees, it was not unreasonable that they should be allowed a few days to seek payment by other than compulsory means. We are, therefore, of opinion that the Court erred in sustaining the demurrer to the first count.

On the trial of the issue on the second count, the Court rejected certain testimony offered by the plaintiff, whereupon he voluntarily suffered a nonsuit. The question arises whether the nonsuit was of the whole action, or applied to the second count only. We are of opinion that, under the circumstances of the case, it applied only to the second count. Whether, therefore, the Court erred or not in rejecting the testimony, we will not inquire, as a writ of error will not lie to a voluntary nonsuit.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Mace, for the plaintiff.

Z. Baird, for the defendants.

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*STROUD v. DAVIS.

JUSTICE'S JUDGMENT—TRANSCRIPT.—The transcript of a justice's judgment and proceedings can be certified, for the purpose of procuring execution against the real estate of the judgment-debtor, only to the Circuit Court of the county in which the judgment was rendered.

ERROR to the *Boone* Circuit Court.

DEWEY, J.—A *scire facias* issued from the *Boone* Circuit Court on the transcript of a judgment and proceedings of a justice of *Clinton* county certified by him to that Court. The

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object of the *scire facias* was to procure an execution against the real estate of the judgment-debtor. Judgment of execution by default against the defendant below.

We do not think that this judgment can be sustained. The Circuit Court had no jurisdiction of the cause. We have two statutes on the subject of certifying the judgments and proceedings of justices of the peace to the Circuit Courts, for the purpose of procuring execution against the real estate of the judgment-debtor. One of them requires the clerk of the Circuit Court to enter on his docket and order book the transcript of the judgment, and makes the judgment a lien on the real estate of the debtor from the time of such entry on the order book. It also provides for the issuing of a *scire facias* on the certified proceedings of the justice for the purpose of procuring an execution. This statute expressly confines the jurisdiction in these cases to the Circuit Court of the county in which the justice's judgment was rendered. R. S., 1838, p. 135. The other statute authorizes the *scire facias* to issue upon the filing of the justice's transcript in the Circuit Court, but says nothing on the subject of a lien, nor does it designate the Court to which the transcript shall be certified. R. S., 1838, p. 375. We do not conceive that it was the design of the Legislature to give jurisdiction in these cases to one Court, when the transcript is entered on the docket and order book, and to another, when it is only filed in the clerk's office. It is our opinion that justices' transcripts of their judgments and proceedings can be certified, for the purpose of procuring execution against the real estate of the judgment-debtor, only to the Circuit Court of the county in which the judgment was rendered.

[*540] **Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Lockwood and W. M. Jenners, for the plaintiff.

W. W. Wick, for the defendant.

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DUMONT, Administrator, v. WRIGHT.

PRIVILEGE FROM ARREST.—A *capias ad respondendum* requiring bail was served, and bail taken, on the 2d of August, 1841, the day of the general election. *Held*, that the defendant ought to be discharged from the custody of his bail, and the bail from his recognizance; but that there was no ground for quashing the writ.

ERROR to the Cass Circuit Court.

BLACKFORD, J.—This was an action of debt on a promissory note and for money paid. At the term to which the *capias ad respondendum*, which required bail, was returnable, the defendant moved the court to quash the writ, on the ground that it was served and bail taken on the second day of August, 1841, the day of the general election in the State. The motion was sustained.

This decision is erroneous. The defendant was privileged from arrest on election day. R. S., 1838, p. 467. But the circumstance that he was arrested on that day, was no cause for quashing the writ. The motion should only have been to discharge the defendant from the custody of his bail and the bail from his recognizance. The defendant was bound to answer to the suit as if the writ had not required bail. The service of the writ, so far as it gave notice to the defendant to appear to the suit, was legal. It was the arrest only from which the defendant was privileged by the statute.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Fletcher, O. Butler and S. Yandes, for the plaintiff.

W. Wright, for the defendant.

[*541] *HILLIARD and Another v. HANNA and Another.

CHANCERY JURISDICTION—INJUNCTION.—One of two makers of a promissory note for \$105 entered himself replevin-bail for the payee for \$100, the latter promising in writing that the note should be of no effect if the bail should have to pay the judgment. The payee assigned the note

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to a person without notice; and the bail, after notice of the assignment, paid the judgment. The assignee sued the makers at law on the note. The makers of the note filed a bill in chancery to have the proceedings at law enjoined and the note canceled. *Held*, that the bill should be dismissed.

APPEAL from the *Allen* Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed by *Hanna* and *Edsall*, the object of which was to obtain a decree enjoining the proceedings in a suit at law commenced by the defendants against the complainants, and requiring the note on which the suit at law was founded to be canceled. The bill was answered, depositions were taken, and a decree was rendered in favor of the complainants.

The following are the material facts: The complainants, for a valuable consideration, executed to one *Tennery* their promissory note for \$105, dated the 24th of *December*, 1831, and payable on or before the 1st of *July*, 1833. Whilst *Tennery* held the note, viz., on the 26th of *December*, 1831, *W. G.* and *G. W. Ewing* recovered a judgment against him for \$100, which judgment was, on the next day after it was rendered, replevied by *Edsall*, one of the complainants. The following instrument, without date, was afterwards executed by *Tennery*: “*Samuel Edsall* has entered bail for me for \$100, and in case I do not pay the amount, and he has it to pay, a note I hold against *Hanna* and *Edsall* for \$105 shall be of no effect, and this will be a sufficient receipt against said note dated *December* the 24th, 1831.” Before the time had expired for which the judgment was replevied, *Tennery* removed from the State without leaving any property to satisfy the judgment. The note was assigned about the 1st of *May*, 1833, by *Tennery* to the defendants, and the latter commenced suit on it against the makers on the 3d of *July*, 1834, the writ being served on the 9th of *August* following. *Edsall*, after the service of the writ, viz., on the 12th of *September*, 1834, paid the judgment against *Tennery* which had been replevied.

[*542] *We think that the payment of the judgment replevied could not, under the statute, be set up as

West v. Thornburgh and Another.

a defense to the suit at law brought by the assignees of the note, the payment not having been made until after notice of the assignment. R. S., 1883, p. 119. The bill before us, indeed, admits this, but, in order to give the Court of chancery jurisdiction, it charges the assignees with intending to defraud the complainants. The answer, however, denies all fraud, and alleges that the defendants were *bona fide* assignees for value, and without notice of the complainants having any defense. There was no proof of the charge; and the bill, therefore, should have been dismissed.

Per Curiam.—The decree is reversed, with costs. Cause remanded, &c.

H. Cooper, for the appellants.

W. H. Coombs and *O. H. Smith*, for the appellees.

WEST v. THORNBURGH and Another.

A tract of land was sold by a commissioner, appointed for the purpose, on a petition for partition of real estate, and a note taken for part of the purchase-money. *Held*, that a bill in chancery could not be sustained by the commissioner to enforce payment, by a sale of the land, of the purchase-money due.

A defendant in chancery, on filing an answer containing matter in avoidance, is entitled to a continuance in order to take depositions.

The Probate Court has no jurisdiction in the case of a bill in chancery to enforce a vendor's lien on real estate for unpaid purchase-money.

ERROR to the *Randolph* Probate Court.

SULLIVAN, J.—*Thornburgh* and *Clevenger* filed a bill in the Probate Court of *Randolph* county, the object of which was to enforce a lien on certain lands which they alleged they had sold to the defendant and another, the purchase-money of which remained unpaid. The bill states that at the *August* term, 1838, of said Court, a petition was filed by *J. Smith* for the partition of the lands therein described, and that such proceedings were thereupon had that the lands were ordered to be sold

and the proceeds divided among the owners and proprietors thereof; that the complainants (together with a third [*543] *person who declined to act), were appointed by the Court commissioners to sell said lands, and to require one-fourth of the purchase-money in hand, and the balance in two equal annual installments, for which they were to take notes with approved security, and to hold the title to the real estate until the purchase-money was paid; that they sold the land according to the order of the Court, and that the defendant, *West*, and one *Barr* became the purchasers; that they paid one-fourth of the purchase-money, and gave their notes with security for the balance; that *Barr* has sold his interest in the lands to *West*; that the first note was paid, but that the second remains unpaid; that the complainants commenced a suit at law on the unpaid note, and obtained a judgment against *West*; that *Barr*, the other principal obligor, and the sureties had left the State and could not be found; that the complainants have been wholly unable to collect the amount of said judgment by execution or otherwise, &c.; wherefore they pray that said lands, or such portion of them as may be necessary, be sold, &c.

The defendant demurred to the bill, but the demurrer was overruled, and he thereupon answered admitting the sale and purchase of the land as stated in the bill; the assignment of *Barr's* interest in the land to *West*; the execution of the notes and the judgment at law; but denied that the complainants had been unable to collect the amount of said judgment by execution. He alleged in his answer that a *feri facias* had been issued on said judgment, and levied on certain personal property; that it had been exposed to sale, but did not sell for want of bidders; that he has, besides the property levied on, personal property sufficient to pay said debt, &c. On the filing of his answer, the defendant moved the Court to continue the cause and for a rule to take depositions, but the continuance was refused; and the Court, on bill and answer, decreed the land to be sold for the payment of the purchase-money, &c.

To the foregoing proceedings various objections are made. The first we shall notice is, that the complainants have no interest in the suit. This objection is well taken. The persons beneficially interested in the matter in controversy, should have been made parties to the bill. The complainants were *mere agents to carry the decree of the Court into effect. They had no interest in the subject-matter, and no person should be made a party if he have no interest in the suit. Story's Eq. Pl., 198, 9. The legal title to the land remained in the parties to the proceedings for its partition, and the purchase-money arising from the sale of it was for their use. It is a general rule in equity, that the person having the legal title in the subject-matter of the suit must be a party, that the legal right may be bound by the decree of the Court.

There is another error in the proceedings which it is proper to notice. The Court should have continued the cause on the application of the defendant, so that he might have an opportunity of taking depositions. The answer admitted, it is true, many of the facts stated in the bill, but it set up and relied upon other facts in avoidance. It was the privilege of the defendant to do so, but it devolved upon him to prove the new matter thus introduced into the cause, and the Court should have granted a continuance, and not forced the defendant into a trial without proof.

There is also another and still more fatal objection to these proceedings. It is, that the Probate Court had not jurisdiction of the subject-matter of the suit. This bill was filed professedly to enforce a vendor's lien on real estate for a portion of the purchase-money remaining unpaid. It was calling upon the Probate Court to exercise general chancery powers. This, the Court could not do. Probate Courts being Courts of limited jurisdiction, are restricted in the exercise of their powers to the jurisdiction conferred upon them. In the cases enumerated in the statute, they may exercise the powers incident to Courts of chancery, but not beyond those cases. If this were a continuation of the proceedings for the

 Springer v. Spooner.

partition of the land, the jurisdiction of the Court could not be doubted. But we regard the suit in that case as having terminated, and this suit as a separate and independent proceeding for the collection of a debt.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

O. H. Smith and *W. H. Brumfield*, for the plaintiff.

J. Smith, for the defendants.

[*545] *WHITNEY v. MILLS, in Error.

ON appeal to the Circuit Court from the judgment of a justice of the peace, the certificate of the justice annexed to his transcript was as follows: "I hereby certify that the foregoing is a true transcript of the proceedings had before me in the above cause, as appears from my docket. Given under my hand and seal," &c. *Held*, that the certificate was sufficient. *Wiley v. Forsee*, Nov. term, 1842.

SPRINGER v. SPOONER.

Before the time expired within which an award was to be made, according to the condition of an arbitration bond, the parties, by an agreement under seal written on the bond, extended the time for making the award. *Held*, that debt would lie on the arbitration bond for non-performance of an award made within the enlarged time.

ERROR to the *Dearborn* Circuit Court.

DEWEY, J.—This was an action of debt. The declaration contains two counts, one on an award, and the other on the submission bond. Both counts show that the condition of the bond was to perform an award to be made on or before the 1st of *December*, 1841; that on the 27th of *November*, 1841, the par-

ties, by an agreement under their hands and seals written upon the bond, extended the time within which the award should be made to the 1st of *January*, 1842; and that the award was made on the 4th of *December*, 1841. A general demurrer to the declaration was overruled. The Court assessed the damages by consent, and rendered a final judgment for the plaintiff.

The question arising under the second count is whether an action will lie on the arbitration bond?

A decision made by the Supreme Court of *New York* is directly in point that it will not, but that the remedy is upon the submission implied in the agreement to enlarge the time. *Freeman v. Adams*, 9 Johns., 115. Highly as we regard the authority of that Court, we can not yield to it on the present

occasion. The decision was founded on *Brown v.*

[*546] *Goodman*, *3 T. R., 592, n., and *Evans v. Thompson*, 5 East, 191, was also quoted. *Brown v. Goodman* is

very concisely and vaguely reported. The agreement to submit was by deed, but it does not appear whether the agreement to enlarge the time of making the award was by deed or parol. The Court, intimating that the plaintiff had another remedy, held that no action would lie upon the bond of submission. This case was subsequently reviewed in the King's Bench, and it was only upon the supposition that the agreement to enlarge was by parol that it was recognized by law. *Creig v. Talbot*, 2 B. & C., 179. In *Evans v. Thompson*, there was a motion, under a statute, for an attachment for not performing an award. The foundation of the proceeding was a bond conditioned for the performance of an award to be made within a specified period, which had been subsequently extended by an agreement (probably under seal) written on the bond. The award was made within the enlarged time. The Court viewed the agreement to extend the time as virtually incorporating within itself all the stipulations of the bond, with the time for making the award enlarged. The attachment was granted. *Creig v. Talbot*, before referred to, can not in principle be distinguished from the cause under consideration. It was an action of debt on

an arbitration bond, the original time for making the award was extended by a subsequent agreement under seal, the award was made within the enlarged time, and the question whether an action could be maintained on the bond arose under a demurrer to the declaration. The Court, after remarking upon *Brown v. Goodman*, and relying upon *Evans v. Thompson* as an authority in point, considered the effect of the subsequent agreement was merely to enlarge the time appointed in the condition of the bond for making the award, and decided that the action was maintainable. And this, we think, was the proper view of the subject.

But it is contended by the plaintiff in error that the agreement in this cause to extend the time of making the award did not authorize it to be made on any day but the 1st of *January*, 1842. This objection can not be sustained. The condition of the bond required the award to be made on or before the 1st of *December*, 1841. The subsequent [*547] *agreement did not designate the 1st of *January* as the day on which it should be made, but extended the period within which to make it to that date. It was made within that period.

The Circuit Court was correct in overruling the demurrer in regard to the second count. That being sufficient, the judgment for the plaintiff was regular. But we know of no objection to the first count, and none is urged by the plaintiff in error.

Per Curiam.—The judgment is affirmed with costs.

D. S. Major and *D. Macy*, for the plaintiff.

J. Ryman, for the defendant.

FERGUSON and Others v. SWEENEY, Administrator.

ADMINISTRATOR DE BONIS NON—WASTE.—*W. F.*, administrator of the estate of *S.*, having committed waste, died, and *M. F.* administered on *W. F.*'s estate. *M. F.*, *R. G. F.*, and *J. A. F.*, fraudulently appropriated the last named estate to their own use. The heirs at law of *S.* obtained

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a decree in chancery against *M. F., R. G. F., and J. A. F.* for said waste, &c. *Held*, that the administrator *de bonis non* of *S.* could neither sue in chancery for said waste, &c., nor enforce said decree.

ERROR to the *Clark* Probate Court.

DEWEY, J.—At the *June* term, 1839, of the Probate Court of *Clark* county, *Mordecai Sweeney*, administrator *de bonis non* of the estate of *James Sweeney*, filed his bill in chancery. The bill alleges that, in 1817, *James Sweeney* died possessed of considerable property; that shortly after his death, one *William Ferguson* became his administrator, and received assets to the amount of \$1,000 or \$1,500; that he paid in debts due from the estate about \$400 or \$500, and wasted the balance by distributing it among his children; that in 1820 or 1821, *William Ferguson* deceased, not having fully administered; that his widow, *Margaret Ferguson*, was appointed his administratrix, and had the control of assets to the amount of \$600 or \$800; that she, in fraudulent collusion with *Robert G. Ferguson*, and *Jane Ann Ferguson* (since married to *George T. King*), the children of herself and *William Ferguson* [*548] son, wasted the assets by *converting them to her and their use, and thereby rendered the estate which she represented insolvent; and that she died destitute of property. The bill further states that, before the appointment of the complainant as administrator *de bonis non* of *James Sweeney's* estate, which happened in 1829, the heirs of *James Sweeney*, the complainant being one, commenced a suit in chancery in the *Clark* Circuit Court against *Margaret Ferguson*, *Robert G. Ferguson*, and *Jane Ann Ferguson*, and others, founded on the above facts, in order to subject to the claim of the complainants certain real estate which *William Ferguson* had fraudulently conveyed to *Robert G. Ferguson* and *Jane Ann Ferguson*; which suit terminated in this Court (it having been transferred here) in a decree that *Margaret Ferguson*, *Robert G. Ferguson* and *Jane Ann Ferguson*, should pay the complainant \$491, and in default thereof, that certain land fraudulently conveyed by *William Ferguson* to *Robert G. Ferguson* should be sold to satisfy the decree. The bill

further alleges that the avails of the land paid \$220 on the decree, the balance being still due. This decree was rendered in *May, 1828*. (The whole record of that cause is copied into this bill, and shows the facts to be substantially the same in both causes.) The bill also states the belief of the complainant to be, that the estate of *William Ferguson* is indebted to the estate of *James Sweeney* to the amount of \$700 or \$800 besides interest; that, in 1804, *Robert George* died leaving an estate to a part of which, amounting to \$600 or \$700, *William Ferguson* was entitled as one of his heirs at law; that, in 1835, *Henry Harrod* became the administrator with the will annexed of *George's* estate, and received assets to the amount of \$5,000; and that he had paid to *George T. King* and *Jane Ann* his wife, as heirs of *William Ferguson*, \$250; and that he had paid to *Robert G. Ferguson* something in the same capacity. The defendants to this bill are *Robert G. Ferguson*, *George T. King*, and *Jane Ann* his wife, and *Henry Harrod*. The prayer of the bill is that *Harrod* be enjoined from paying, and the other defendants from receiving, any further sums out of the assets belonging to *George's* estate; and that the other defendants pay to the the complainant whatever sum *William Ferguson* owed *James Sweeney's* estate.

[*549] *The Probate Court granted the injunction. *Harrod* answered, and the cause as to him was continued. The bill was taken as confessed against the other defendants, and they were decreed to pay to the complainant \$482.47, being the amount due on the decree in favour of *Sweeney's* heirs in the other suit.

The decree of the Probate Court must be reversed. It is sufficient to remark, that the merits of this cause were involved in, and determined by, the suit by *James Sweeney's* heirs. The decree in that action put at rest all controversy between the estate of *James Sweeney* and the estate of *William Ferguson*. It is true, that the decree is not wholly satisfied, but this complainant, as administrator *de bonis non* of *Sweeney*, has no right to enforce it. It belongs to the complainants in that suit, and constitutes a personal debt against the defendants

The State v. Smith.

therein. Those complainants, or their representatives, only can enforce it.

Per Curiam.—The decree is reversed, the injunction dissolved, and the bill dismissed with costs.

R. Crawford, for the plaintiffs.

H. B. Thornton and *A. C. Griffith*, for the defendant.

THE STATE v. SMITH.

COSTS.—A defendant pleaded guilty to an indictment for selling spirituous liquors without license; and the Court fined him \$2.00, saying nothing as to the costs. *Held*, that the costs of prosecution should, in such case, be included in the judgment.

ERROR to the *Miami* Circuit Court.

BLACKFORD, J.—Indictment for selling spirituous liquors, &c., without a license. The defendant pleaded guilty, and the Court gave judgment against him for \$2.00 as a fine; but no judgment was rendered against the defendant for the costs.

The statute enacts that in all cases of conviction of any offense, &c., the costs of prosecution shall be included in the judgment rendered against the convict, unless the jury expressly find otherwise. R. S., 1838, p. 220. According to *this statute, the judgment without costs is erroneous; there being a conviction in the case, and no express finding under the statute that the costs should not be paid.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to the Circuit Court to include in the judgment for \$2.00, the costs of the prosecution.

A. A. Hammond, for the State.

W. Wright, for the defendant.

SMITH v. WRIGHT and Others.

A summons was served on *S.* as garnishee in attachment on the 30th of *September*, 1839, who answered that on the 25th of that month he gave his obligation to the defendant in attachment for a certain sum of money - that he had been informed by a letter from the obligee, dated the 2d of *October*, 1839, and received a day or two afterwards, that the obligation was assigned to *D.*; that he had since received notice of its assignment by *D.* to *P.* and *G.*; that the obligation had been presented for payment; and that the assignment to *D.* was dated the 26th of *September*, 1839.(a) The plaintiff replied: 1, That the obligation was not *bona fide* assigned to *D.* before service of the summons on the garnishee; 2, That the garnishee had no notice of the assignment till after he was summoned; 3, That the assignment was without consideration, and made to defraud the plaintiff and other creditors of the obligee.

Held, that the replications were all bad. *Held*, also, that if the assignment was fraudulent and void as to the obligee's creditors, they might have it set aside by a suit in chancery, and might, until that suit was determined, have the payment of the amount due by the garnishee enjoined.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—A writ of domestic attachment was issued on the 30th of *September*, 1839, in favor of *Wright* against the goods and chattels, &c., of *Charles Duncombe*, an absconding debtor; and on the same day, a summons in the case was served on *Smith* as garnishee. *Porter* and others, as creditors of *Duncombe*, also became parties to the suit as plaintiffs. At the *May* term, 1840, judgments were rendered against *Duncombe* in favour of the plaintiffs. *Smith*, the garnishee, filed several answers, which taken together, state that on the 25th of *September*, 1839, he gave his obligation for \$672.97 [*551] to *Duncombe* for *value received, payable by installments, which, subject to certain deductions, were due; that he was informed by a letter from *Duncombe*, dated at *Dayton, Ohio*, on the 2d of *October*, 1839, and received by him a day or two afterwards, that the obligation was assigned to *Alford H. Duncombe*, of *New York*; that he has since received notice of *Alford H. Duncombe's* assignment of the obligation

(a) *Smith v. Blatchford*, 2 Ind., 184.

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to *Perkins* and *Gillis*, of *New York*; that the obligation has been presented for payment; and that the assignment to *Alford H. Duncombe* was dated on the 26th of *September*, 1839.

The plaintiffs replied to the answer as follows: 1, That the obligation was not *bona fide* assigned to *Alford H. Duncombe* before the summons was served on *Smith* as garnishee; 2, That *Smith* had no notice of the assignment until after he was summoned as garnishee; 3, That the assignment was made without consideration, and to defraud the plaintiffs and other creditors of the obligee.

The first replication was rejected on the defendant's motion. The second was demurred to and the demurrer sustained. The third was also demurred to, but the demurrer was overruled.

Judgments were rendered for the plaintiffs against *Smith*.

The first replication was correctly rejected. It denies the assignment, and should therefore have been sworn to. R. S., 1838, p. 449. The demurrer to the second replication was correctly sustained. The time of the notice to *Smith* of the assignment was immaterial. If the assignment was made before service of the summons, the obligation was not subject to the attachment; it not being, at the time of such service, the property of the defendant in attachment. We think the third replication can not be sustained. The question whether the assignment of the obligation mentioned in this replication was void as made to defraud the plaintiffs, can not be determined in a suit in which those interested in supporting the assignment have no opportunity to be heard. If *Smith* had taken issue on this replication, and it had been found against him, the holders of the obligation would not have been bound by that judgment. It may be said, however, that *Smith* might give notice of the pendency of the attachment to the persons interested; but if that

[*552] would protect him from the *risk of having to pay the money twice, of which we give no opinion, it is not reasonable that he should, by this suit, be obliged to give such notice. As he is bound to pay what is due on the obligation to the persons entitled to it, and as it is imma-

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rial to him whether those persons be the plaintiffs or the holders of the obligation, he ought not to be required, in order to secure himself from loss, to give the notice alluded to, which must be personal, and be frequently attended with considerable difficulty and expense.

If the assignment is void as to the creditors of the obligee, on the ground that it was made to defraud them, they may have it set aside by a suit in chancery against the persons to be affected by the decree, and they may have *Smith* enjoined from paying the amount due on the obligation till the suit in chancery is determined.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

P. Sweetser, for the plaintiff.

O. H. Smith and *W. H. Brumfield*, for the defendants.

GREEN v. KIMBLE.

REPLEVIN BAIL—RIGHTS OF.—After an execution against the goods, &c., of *A* and his replevin bail *B* was delivered to the sheriff, *C* fraudulently converted certain goods of *A* to his own use, the latter having no other property. The execution was then levied on the property of *B*, who paid a part of the judgment, and sued *C* for said tort. *Held*, that the action would not lie, the plaintiff having no legal interest in the goods when the injury was committed.(a)

APPEAL from the *Franklin* Circuit Court.

SULLIVAN, J.—Case by *Kimble* against *Green*. The declaration contains the following statement of facts: At the *August* term, 1841, of the *Franklin* Circuit Court, *William McClure* obtained a judgment against one *Clark* for the sum of \$238.24, which was afterwards replevied by *Kimble*. On the 19th of *February*, 1842, *McClure* issued a *fieri facias* on said judgment against the goods and chattels, &c., of *Clark* and *Kimble*, which writ was delivered to the sheriff on the same day; that

(a) See *Robeson v. Roberts*, 20 Ind., 155.

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at the time the writ came into the hands of the sheriff, [*553] *Clark* was the owner and was *possessed of a large number, to wit, twenty head of cattle of the value of \$200; and that said writ, after the delivery thereof to the sheriff, was a lien upon the said cattle, &c. Yet the defendant, *Green*, well knowing the premises, but contriving, &c., afterwards and in the lifetime of said writ, to wit, &c., fraudulently drove said cattle out of and beyond the limits of said county, and converted and disposed of the same to his own use, whereby the sheriff was prevented from seizing said cattle, &c. The declaration further states that *Clark* had not, at any time since the issuing of said writ, any goods or chattels, lands or tenements, liable to be levied upon by virtue of said writ, and in consequence thereof the writ was levied upon the property of the plaintiff *Kimble*; that he had paid a large part of said judgment; and that his property so levied upon was holden for the residue; that *Clark* had become and was wholly insolvent, &c.

The defendant pleaded not guilty. Verdict for the plaintiff. Motion in arrest of judgment overruled, and judgment on the verdict.

The appellant contends that upon the facts disclosed in the declaration, the plaintiff below had no cause of action, and that the judgment therefore should have been arrested.

This action is new in point of precedent; the appellee contends, however, that the law recognizes principles upon which it may be supported. The removal of the cattle by the appellant was, it is said, a consequential injury to the appellee, and that for every such wrong the law gives a remedy. It is true, that for the willful violation of every right the law affords a remedy; but the question here is, whether the tort committed by the appellant was a violation of the rights of the appellee? That *Clark* might maintain an action against the appellant for the removal of the cattle will not be controverted; and so, *McClure*, by virtue of the execution in the hands of the sheriff, had acquired a lien upon the cattle, and might maintain an action against *Green* for the wrongful act by which he, *McC*,

was prevented from selling them in satisfaction of his judgment. *Yates v. Joyce*, 11 J. R., 136. But the appellee in this case, by virtue of the execution, acquired no right to the property, the writ being against his goods and chattels and not for his benefit. The case of *Yates v. Joyce*, [*554] **supra*, is relied upon for the affirmance of the judgment of the Circuit Court. The facts of that case were as follows: *Kane* recovered a judgment in the Supreme Court of *New York* against *Joyce* and another, which was afterwards assigned to the plaintiff, who issued execution thereon. The writ, for want of sufficient goods and chattels, was levied upon a lot in the city of *Schenectady*, on which were situate a dwelling-house, store-house, &c. The defendant knowing the foregoing facts, afterwards wrongfully, &c., took down and removed away from said lot, and converted to his own use, a certain building, &c., of the value, &c., by reason whereof the plaintiff was deprived from obtaining satisfaction of his judgment. The Court decided that the plaintiff should recover, because, they said, they would assume that he had acquired a *legal lien* on the property by means of the judgment in favour of *Kane*, and the assignment of it to himself. The right of the plaintiff to recover, was put expressly on the ground that he had a legal claim to the property injured; and it seems it was necessary that the Court should assume that fact to sustain the verdict. In the case before us, there is no ground for the pretence that the appellee had any right whatever to the property removed. It is a general rule, that the action for a tort must be brought in the name of the person who was legally interested in the property at the time the tort was committed. *Dawes v. Peck*, 8 T. R., 330.

We are of opinion that the plaintiff below had no right of action against the defendant, and that the judgment should have been arrested.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. H. Smith, for the appellant.

J. M. Johnston, J. Ryman, and P. L. Spooner, for the appellee.

THE STATE v. MULLINIX, in Error.

AN indictment for retailing spirituous liquors without license, need not state the kind of liquor sold. *The State v. Groeter*, Nov. term, 1841, and note. (18 Ind., 388.)

[*555] *HIGH v. TAYLOR, Administrator.

JURISDICTION.—Probate Courts have concurrent jurisdiction with the Circuit Courts in actions by or against administrators, &c., in which the amount in controversy exceeds \$50.00.

ERROR to the Warren Probate Court.

DEWEY, J.—This was an action of assumpsit commenced in the Warren Probate Court, *February* term, 1843, against an administrator on a promissory note made by his intestate, on the 18th of *March*, 1839, for \$50.00 payable one day after date with ten *per cent.* interest. Damages laid at \$100. On the motion of the defendant, the Court dismissed the cause for want of jurisdiction, and rendered judgment against the plaintiff for costs.

The Court committed an error in dismissing the action. Probate Courts have concurrent jurisdiction with the Circuit Courts in actions by or against administrators, &c., in which the amount in controversy exceeds \$50.00. R. S., 1838, p. 173. See, also, *Brown v. McQueen*, *May* term, 1842. The note declared on, with the interest due upon it at the commencement of the action, amounted to more than \$50.00; and the damages were laid at \$100. The amount in controversy was sufficient to give the probate Court jurisdiction.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

R. A. Chandler, for the plaintiff.

G. W. Lawson, for the defendant.

Vestal v. Burditt and Another.

VESTAL v. BURDITT and Another.

PRACTICE.—In debt by an assignee against the maker of a promissory note, the general issue, sworn to in general terms, does not require the plaintiff to prove the execution of the assignment.

PLEADING.—If a plaintiff suffer a nonsuit in consequence of an erroneous exclusion of his evidence, he is not entitled to a writ of error.

[*556] *ERROR to the *Tippecanoe* Circuit Court.

DEWEY, J.—*Vestal* brought an action of debt against *Burditt* and *Calvert* on two promissory notes made by them to *J. B. Danforth* and Co., and indorsed by the latter to the plaintiff. The defendants severally pleaded the general issue, the plea of *Calvert* being accompanied by an oath of its truth in general terms. They also pleaded jointly two special pleas, to which there were replications in denial, and issues. On the trial, the plaintiff offered in evidence two promissory notes corresponding with those set out in the declaration, having first proved their execution by the defendants. The defendants objected to their admissibility, first, because there was no proof of the existence of such a firm as *J. B. Danforth* and Co.; and, secondly, because the plaintiff failed to prove the assignment of them as alleged in the declaration. The Court rejected the notes; in consequence of which, as a bill of exceptions states, the plaintiff was compelled to suffer a nonsuit. Final judgment was rendered against him for costs.

The first objection made to the notes is very properly abandoned. The second is still urged, and, we think, correctly. Before the passage of the statute requiring pleading, which denies the assignment of a written contract made the foundation of an action or a defense, to be verified by oath, a plaintiff, declaring on an assigned note, was bound to prove the execution of the assignment under the general issue. That proof is now dispensed with, unless the party denying the assignment make oath that he has reason to believe, and does believe, the assignment was not made before the commencement of the suit. R. S. 1838, p. 449. We do not think that a general oath of

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the truth of the plea of *nil debit* complies with this statute. The oath should specifically refer to the assignment, and deny its existence according to the reasonable belief of the party making the oath, in the manner pointed out by the act. The notes should have been admitted in evidence without proof of the execution of the assignments.

But we are not at liberty to correct the error of the Circuit Court for want of jurisdiction in this cause. We have heretofore decided that a writ of error lies in a cause, [*557] in which *the plaintiff has been induced to suffer a nonsuit by the instruction of the Court to the jury, that he had entirely failed to produce any proof of a cause of action. We have conceived that a plaintiff, in such a case, was not bound to run the hazard of a verdict, which, if against him, (as would almost surely be the case), would be conclusive, and which, if in his favor, would be set aside by the Court. *Pollard v. Buttery*, 3 Blackf., 239. But this is not a case of that character. It comes within the principle of *Moore v. Herndon*, 5 Blackf., 168, in which we held that a writ of error did not lie after a voluntary nonsuit.

Per Curiam.—The writ or error is dismissed.

R. A. Chandler, for the plaintiff.

G. S. Orth, for the defendants.

 LODGE and Another v. THE STATE BANK.

MERCANTILE PAPER.—PRACTICE.—In a suit against several persons as makers, and others as indorsers, of a promissory note negotiable and payable at a bank within the State, a judgment by default can not be rendered against some of the defendants only, unless there be a return of “not found” as to the others.

SAME.—RETURN OF SHERIFF.—In assumpsit against *A, B, C,* and *D*, the sheriff returned the writ served as to *A* and *B*, and “not found” as to *C* and *D*, but stated in his return that he did not go to the house of *D* by order of the plaintiff’s attorney. *Held*, that there was no legal return of “not found” as to *D*.

PRACTICE.—If in a suit against the makers and indorsers of a promissory

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note, under the statute of 1839, the defendants appear and plead to the action, the plaintiff must recover, if at all, against all the defendants. WITHDRAWAL OF APPEARANCE.--If a defendant appear and plead to an action, and afterwards withdraw his plea and appearance, the case stands as if there had been no appearance and plea.

ERROR to the *Jefferson* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *The State Bank of Indiana* against *John Sheets*, *Benjamin W. Grover*, *Lewis Sheets*, and *Nelson Lodge*. The writ was returnable to the *September* term, 1841, and was returned executed on *Lewis Sheets* and *Nelson Lodge*, and as to the other defendants as follows: “Two of said defendants, *John Sheets* and *Benjamin W. Grover*, not found in my bailiwick; and

I did not go to said *Benjamin W. Grover*’s house by [*558] *order of plaintiff’s attorney.” The cause of action, as described in the declaration, was a promissory note executed by *John Sheets* and *Benjamin W. Grover* to *Lewis Sheets*, negotiable and payable at a branch of the State Bank, indorsed by the payee to *Nelson Lodge*, and by the latter to the plaintiff. At the *September* term, 1841, the defendants appeared and filed their plea of non assumpsit, and the cause was continued. At the *March* term, 1842, the parties appeared and the cause was again continued. At the *September* term, 1842, the following entry appears of record: “The parties come, and the defendants withdraw their plea and also their appearance by them heretofore entered; and it appearing to the satisfaction of the Court, that the process has been duly served on *Nelson Lodge* and *Lewis Sheets*, two of the defendants, &c., and returned ‘not found’ as to *John Sheets* and *Benjamin W. Grover*, the other defendants; and said *Nelson Lodge* and *Lewis Sheets* being three times called come not but make default; it is therefore considered that the plaintiff recover of said *Nelson Lodge* and *Lewis Sheets* the sum of,” &c.

This is a suit against four persons on a promissory note negotiable and payable at a bank within the State, two of the defendants being alleged to be makers, and the others indorsers

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of the note. To authorize the judgment by default against two of the defendants only, it was necessary that there should have been a return of "not found" as to the others. There is such a return as to *John Sheets* but not as to *Grover*. The statute enacts, that the sheriff shall not return the process of "not found" as to any defendant, unless he shall have been once at least at his usual place of residence if he have any. R. C., 1838, p. 447. The sheriff in this case returns "not found" as to *Grover*, but states in his return, that he did not go to his house by order of the plaintiff's attorney. It appears, therefore, that there is no legal return of "not found" as to *Grover*.

The plaintiff contends that as all the defendants appeared and pleaded to the action, the objection as to want of service of the writ or any of the defendants was waived. But supposing there were in the record such an appearance and plea, the judgment would still be erroneous, because then [*559] it would *appear that the judgment should have been rendered, if at all, against all the defendants. *Goodlet v. Britton*, at this term. The record, however, shows that the appearance and plea were withdrawn, which left the case as if there had been no appearance and plea.

This is, therefore, a suit against four persons on contract, process being served on two of them, a return of "not found" as to one of the others, and no legal return as to the other; and a judgment by default rendered against the two upon whom the writ was executed. The judgment, under these circumstances, can not be sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Cushing and *J. G. Marshall*, for the plaintiffs.

S. C. Stevens, for the defendant.

HAM v. ROGERS and Others.

TRESPASS, LOCAL.—The action of trespass *quare clausum fregit* is local, and can be brought only in the county in which the trespass was committed.(a)

SAME.—The circumstance that such trespass was committed in one county by persons resident in another, does not authorize the *capias ad respondendum*, issued in the former county, to be directed to the sheriff of the latter.

ERROR to the *Montgomery* Circuit Court.

BLACKFORD, J.—This was an action of trespass *quare clausum fregit*. The writ was issued by the clerk of the Circuit Court in *Montgomery* county, in which county the trespass was alleged to have been committed. There were four defendants, all of whom resided in *Clinton* county, to the sheriff of which county the writ was directed, and was by him there executed on the defendants. On the return of the writ to the *Montgomery* Circuit Court, an attorney, as *amicus curiæ*, moved the Court to quash the writ, and the motion was sustained.

This decision is right. A writ can not be directed to the sheriff of a different county from that in which it issues; unless authorized by statute. There are only two cases in which the statute provides for the directing of a *capias ad* [*560] **respondendum* to such other county. One is, where there are several defendants, and one or more of them reside in the county in which the writ issues, and the other or others reside in a different county. The other case is, when the defendant resides in the county where the suit is instituted, and afterwards flees or removes therefrom, and the plaintiff makes affidavit of that fact. R. S., 1838, p. 447. The case before us does not come within either of those provisions, as the defendants all resided in a different county from that in which the writ issued.

The plaintiff contends that this action being local could be brought only in *Montgomery* county, the trespass having been there committed, and that it could only be so brought by send-

(a) *Prichard v. Campbell*, 5 Ind., 494.

Ham v. Rogers and Others.

ing the writ to *Clinton* county. It is no doubt true, that the suit would lie in the county only in which the trespass was committed; *Livingston v. Jefferson*, 1 Brock., 203; but it does not follow that the process can, in such case, be sent to another county. The process can only be sent, as we have already observed, when there is a statute authorizing it; and there is no statute authorizing it under the circumstances of this case. The want of some statutory provision on the subject may be a *casus omissus*; but if it be so, the omission can not be remedied by this court.

Per Curiam.—The judgment is affirmed with costs.

R. C. Gregory, for the plaintiff.

H. S. Lane and *S. C. Wilson*, for the defendants.

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A

ABATEMENT.

See ATTACHMENT, 4. EVIDENCE, 27.
PROMISSORY NOTES, 2. RECOGNIZANCE, 3.

ACTION.

After an execution against the goods, &c., of *A* and his replevin bail, *B*, was delivered to the sheriff, *C* fraudulently converted certain goods of *A* to his own use, the latter having no other property. The execution was then levied on the property of *B*, who paid a part of the judgment, and sued *C* for said tort. *Held*, that the action would not lie, the plaintiff having no legal interest in the goods when the injury was committed.—*Green v. Kimble* 552

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A defendant by permitting the death of one of the plaintiffs to be suggested on the record without opposition, before the trial commences, admits the suggestion to be true.—*Henderson v. Reeves* 101

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See PRINCIPAL AND AGENT.

AGREEMENT.

An agreement not to sue for a limited time on a promissory note is no bar

to a suit on the note commenced within that time.—*Lowe et al. v. Blair et al.* 282

ALIEN.

A father and his minor daughter, both aliens, came to the *United States* in 1820. Afterwards, in the same year, the father made a declaration in the proper Court of his intention of becoming a citizen of the *United States*, &c., but did not report his daughter, &c. In the next year he purchased land in this State, and died in 1828 without being naturalized, having devised the land to his said daughter. *Held*, that the testator might have acquired under the statute, by his purchase, a perfect title to the land; but that such title could not pass, by the devise, to his alien daughter. *Held*, also, that by the law governing this case, neither an alien nor any person claiming from, through or under an alien ancestor, could acquire a title to real estate by descent. *Held*, also, that the statute of 1840, for the relief of *John Wynn* and others, conferred no title on the lessors of the plaintiff in the suit to the land in controversy.—*Eldon v. Doe d. Wynn et al.* 341

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See EVIDENCE, 31.

1. The clerk of the Circuit Court, in entering of record a justice's transcript, &c., which was on file and certified under the hand and seal of the justice, omitted the seal to the certificate. *Held*, that the mistake might be amended.—*Wiley v. Forsee* 246
2. The clerk having omitted to state in a *capias ad respondendum* the nature of the action or the amount claimed, it was held that the mis

take might be amended by the
proœcipe.—*The State v. Hood et al.* 260

APPEAL.

See BASTARDY, 1, 2. PARTIES, 1, 2.

After an entry of judgment for the plaintiff on a justice's docket, this statement followed, viz.: "On, &c., comes the defendant and files an appeal bond, but does not ask an appeal until he further considers the matter." *Held* that notwithstanding that statement, the defendant might, on appeal, show by affidavits that the appeal was prayed for when the appeal bond was filed.—*Frazer v. Smith*. . . . 210

APPEAL BOND.

Declaration in debt on a bond conditioned to prosecute, with effect, an appeal from the judgment of a justice of the peace. Breaches, 1, That the appellant wholly failed to prosecute the appeal. 2, That he failed to cause a transcript of the judgment to be filed in the clerk's office within twenty days after taking the appeal. 3, That he did not prosecute the appeal with effect; but, on the contrary, the appeal was dismissed because the transcript of the judgment was not filed in the clerk's office within twenty days, &c. *Held*, on general demurrer, that the first and third breaches were good, and the second bad.—*Rock v. Gordon et al.* 192

ARBITRATION.

1. An award on which a justice of the peace has rendered judgment may be impeached before the justice within ten days from the rendition of the judgment; or it may be impeached in the Circuit Court on appeal, though it was not objected to before the justice.—*Payne v. Miller*. 178
2. Before the time expired within which an award was to be made, according to the condition of an arbitration bond, the parties, by an agreement under seal written on the bond, extended the time for making the award. *Held*, that debt would lie on the arbitration bond for non-performance of an award made within the enlarged time.—*Springer v. Spooner*. . . . 545

ARREST OF JUDGMENT.

An arrest of judgment is a final disposition of the cause, to which a writ of error lies.—*Powell et al. v. Kinney et al.* 359

ARSON.

A declaration in malicious prosecution alleged that the defendant falsely, &c., before a certain justice of the peace, charged the plaintiff with having willfully and maliciously set on fire and burned a certain district school house (naming the district, township and county.) *Held*, that the allegation contained a legal description of arson.—*Bartlett v. Jennison*. . . . 295

ASSAULT AND BATTERY.

Trespass for an assault and battery. Plea, *son assault demesne*. Replications, 1, *de injuria*. 2, excess. The defendant having moved that the second replication be set aside, the Court gave the plaintiff leave to select which replication he would retain. The plaintiff refused to make the selection, and the Court granted the motion. *Held*, that there was no error in this proceeding. *Held*, also, that the plaintiff had no right on the trial of, said cause to ask a witness whether, in his opinion, the fight would have occurred if the defendant had informed the plaintiff that he had a knife.—*Reese v. Bolton*. 185

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ASSUMPSIT.

1. Assumpsit for goods sold, &c. Pleas, Non-assumpsit, &c. The facts were as follows: The plaintiff being the owner of two thousand gunny bags, instructed a warehouseman, in whose possession they were, to deliver them to the defendant if he called for them, but if they were not so called for, to sell them. The defendant called and received the bags—paying the warehouseman his charges, &c. At the time of this transaction, there was a contract between the plaintiff and defendant for a quantity of corn to be delivered by the latter to the for.

- mer in bags; which corn was not delivered. *Held*, that these facts did not sustain the suit.—*Cruikshank et al. v. Henry*.....19
2. *Indebitatus assumpsit* lies to recover back money paid by a purchaser on a parol contract for real estate, where the vendor or his heirs are unable or fail to perform their part of the contract, notwithstanding the vendee may have occupied the land under the contract.—*Barickman v. Kuykendall*.....21
3. The declaration in this case contained two counts. The first stated that the defendant informed the plaintiff that he owned a certain steamboat running on the *Mississippi* river, and falsely and deceitfully represented that the boat was new and in good repair; that the plaintiff, confiding in said representations, purchased the boat (it not being present) for a certain sum, paid a part, &c.; that the defendant promised to deliver the boat in good repair to the plaintiff at, &c., as soon as possible (the property of the boat to remain in the defendant until delivery as aforesaid); that the plaintiff had been always ready to receive the boat, &c.; but that the defendant, disregarding his promises, thereby deceived and defrauded the plaintiff, as the boat was not in good repair, and fraudulently refused to deliver the boat in the condition he promised, though often requested, &c. The second count was in *assumpsit* for money had and received. *Held*, that the first count was in *assumpsit*, and that there was therefore no misjoinder.—*Powell et al. v. Kinney et al* 359

ATTACHMENT.

1. When the property of an absconding debtor is liable to seizure by foreign attachment for a debt, the remedy of his creditor is not in chancery but at law.—*Latham et al. v. Barlow et al.*.....97
2. Although a writ of attachment be levied on goods which do not belong to the defendant, the plaintiff in attachment, having taken no part in the levy, is not liable for the conduct of the officer who made it.—*Butler et al. v. Borders*....160
3. On an appeal to the Circuit Court from a justice's judgment in a case of foreign attachment, the parties

- appeared, and, by their agreement, the cause was tried by the Court. Judgment for the plaintiff. The judgment was objected to on error because the attachment bond was defective, and because publication of the pendency of the suit had not been made and proved before the justice continued the cause. *Held*, that the objections came too late.—*Voorhees & Co. v. Hoagland*...232
4. The above-mentioned suit was against several partners, and it was proved on the trial in the Circuit Court that one of them resided in this State when the suit was commenced. *Held*, that the suit might have been objected to on account of such residence by a plea in abatement, but that it was too late to make the objection after the defendants had appeared to the action and entered on a trial of the merits. *Ibid*.
5. A writ of foreign attachment may issue, by statute, against partners in the name of their firm.... *Ibid*.
6. If in an attachment against a boat for materials, &c., the boat be released by the giving of a bond as prescribed by statute, the judgment for the plaintiff should be against the debtor personally.—*Jones et al. v. Gresham*.....291
7. But if no bond be given, in such case, the judgment for the plaintiff should be for a sale of the boat. *Ibid*.
8. A garnishee in foreign attachment admitted, in answer to interrogatories, his indebtedness by judgment to the defendant in attachment. The Court, without any motion, and against the plaintiff's will, dismissed the proceedings against the garnishee—the attachment being still pending. *Held*, that the dismissal was erroneous.—*Helbert v. Stinson et al*398
9. A person indebted by judgment to the defendant in such attachment may be summoned as a garnishee and be held responsible to the plaintiff in attachment.... *Ibid*.
10. A summons was served on S. as garnishee in attachment on the 30th of September, 1839, who answered that on the 25th of that month he gave his obligation to the defendant in attachment for a certain sum of money; that he had been informed by a letter from the obligee, dated the 2d of October, 1839, and received a day or two afterwards, that the

obligation was assigned to *D.*; that he had since received notice of its assignment by *D.* to *P.* and *G.*; that the obligation had been presented for payment; and that the assignment to *D.* was dated the 26th of September, 1839. The plaintiff replied: 1, That the obligation was not *bona fide* assigned to *D.* before service of the summons on the garnishee; 2, That the garnishee had no notice of the assignment till after he was summoned; 3, That the assignment was without consideration, and made to defraud the plaintiff and other creditors of the obligee. *Held*, that the replications were all bad. *Held*, also, that if the assignment was fraudulent and void as to the obligee's creditors, they might have it set aside by a suit in chancery, and might, until that suit was determined, have the payment of the amount due by the garnishee enjoined.—*Smith v. Wright et al.* 550

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BAIL.

1. Suit on an appeal bond against the executors of one of the sureties. The appeal had been taken by a defendant from a judgment against him in ejectment; and the bond was conditioned for the prosecution of the appeal with effect, and the payment of the condemnation money and costs should the judgment be against the appellant. Breach, that the appellant did not prosecute the appeal with effect, and that the judgment was affirmed. *Held*, that the plaintiff could not, in this suit, recover the *mesne profits*. *Held*, also, that the breach assigned was sufficient.—*Doe v. Daniels et al.* 8
2. *Scire facias* against replevin bail entered on the docket of a justice of the peace. Pleas, 1, No execution issued against the goods of the principal. 2, *Non est factum*. *Held*, that the issues on the plaintiff's part must be proved, not by a transcript from the justice's docket, but by producing the execution or a certified copy of it, and proving the execution of the entry of bail as the execution of other instruments of writing is required to be proved.—*Snyder v. Norris.* 33
3. Bail for the stay of execution of a

judgment rendered by a justice of the peace must be entered on his docket, and is a matter which may be proved by a transcript, at least when the entry is not denied on oath.—*Remington v. Henry.* 63

4. The bail has a right to an *exoneretur* without a render of the principal, in cases where the latter, if rendered, would be entitled to an immediate discharge. And the statute abolishing imprisonment for debt gives the bail a right to such *exoneretur*.—*White et al. v. Guest.* 228
5. An *exoneretur* entered on the motion of the bail after an action commenced against him is a good ground for dismissing the suit at the costs of the bail; but it should not be pleaded in bar of the action. *Ibid.*
6. A suit on a recognizance of special bail was pending when the act abolishing imprisonment for debt took effect. *Held*, that it was not the immediate effect of the act to defeat the further maintenance of the suit; but that, without a render of the principal, the bail might have an *exoneretur* entered, and have the suit dismissed at his own costs.—*Scott v. Brokaw.* 241

BANK.

See BILLS OF EXCHANGE, 2.

BANK STOCK.

See STATE BANK OF INDIANA.

BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY.

1. The State may appeal to the Circuit Court from the judgment of a justice of the peace in favor of the defendant in a case of bastardy; and no appeal bond is required in such case.—*Walker v. The State.* . 1
2. The Circuit Court, on such appeal, may order a writ to issue to compel the defendant's appearance. *Ibid.*
3. The complainant in such case (the child being unborn), having been examined on the trial as a witness for the State, may be asked on cross-examination whether she had had sexual intercourse with any other person than the defendant about the time when she said the child was begotten; but not whether she had

- had such intercourse at any other time*Ibid.*
4. A witness for the defendant in a case of bastardy having stated on cross-examination that the defendant had always denied being the father of the child, was asked by the defendant to relate all he had heard him say about the matter. *Held*, that the question was improper.....*Ibid.*
5. In a case of bastardy, which is a civil suit, the defendant can not introduce evidence of his general good character.....*Ibid.*
6. If the complainant's examination before the justice in such case, which was reduced to writing, be not introduced as evidence on the trial in the Circuit Court, neither party can refer to it in argument.....*Ibid.*
7. If there be a preponderance of evidence in such case against the defendant, he may be found guilty. *Ibid.*
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9. The mother of an infant illegitimate child is its natural guardian, and has a right to its custody.—*Dalton v. The State*357
10. The mother of such child gave it to A, and afterwards married B. *Held*, that the gift did not deprive the mother before her marriage, nor the mother and her husband after the marriage, of the right to the custody of the child during its infancy.....*Ibid.*
11. The mother can not be deprived of the guardianship of such child by the appointment, by the Probate Court, of another guardian for it, if no notice be given to her of the application for such appointment.*Ibid.*
12. If in a case of bastardy before a justice of the peace, the defendant be found guilty in his absence, and the proceedings be certified to the Circuit Court, a warrant should issue against the defendant directed to the county in which the Court is held, or in which the defendant may be found, if he reside in the State.—*Hunter v. The State*.....383
13. If the defendant in such case do not reside in the State, an order of publication may be made on reasonable evidence of his non-residence. *Ibid.*
14. An order of publication in such case is not authorized by a return of "not found" to a warrant issued by the mere direction of the attorney for the State to a different county from that in which the Court is held.....*Ibid.*
15. To justify a judgment of the Circuit Court in such case against a defendant who does not appear, there must be a verdict against him.....*Ibid.*
16. The judgment in such case against the defendant should be for a specific sum, with directions for its payment, when collected, in such parts and at such times, for the maintenance of the child, as the Court shall think proper, and for costs.....*Ibid.*
17. A person charged before a justice of the peace with being the father of an illegitimate child was, on examination of the mother, discharged by the justice. *Held*, that the discharge was no bar to a subsequent prosecution for the same offense.—*Davis v. The State*.....494
18. According to the common law, if a bastard die intestate and without issue, leaving real estate, the estate escheats.—*Doe d. Crawle et al. v. Bates et ux.*.....533
19. The 8th section of the statute of 1831, regulating descents, enables a bastard to inherit property that descends through his mother; but it does not enable his mother, brothers, or sisters, to inherit from him.....*Ibid.*
20. By the 6th section of said statute, if a bastard die intestate and without issue, leaving a widow, she shall inherit his real estate.....*Ibid.*

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SORY NOTES, 17.

BILL OF EXCEPTIONS.

A bill of exceptions, taken in a suit on

the assignment of a promissory note, stated that the plaintiff produced certain evidence, viz., the following note and indorsement: (Insert said note and indorsement.) *Held*, that the bill did not show that the note and assignment, under which the plaintiff claimed, were produced at the trial.—*Spears v. Clark*.....167

BILLS OF EXCHANGE.

1. The indorsee of a bill of exchange can not maintain a joint suit against the drawer, acceptor and indorser of the bill.—*Pierce et al. v. Eustis*.159
2. The State Bank of Indiana, through one of its branches, received a bill of exchange from an indorsee, before it was due, to be collected for him for a reasonable reward, but afterwards failed to present the bill to the drawee either for acceptance or payment. *Held*, that the bank was liable to the indorsee for the damages he had sustained in consequence of the failure to present the bill.—*Tyson v. The State Bank*....225

BOND.

See PLEADING, 5, 8, 24, 25, 28, 30, 39, 51, 52, 57, 58.

1. If a defendant, sued as the obligor of a bond, do not appear to be a party to the bond shown on *oyer*, a demurrer to the declaration must, of course, be sustained.—*Wells v. Jackson*40
2. If a bond assignable by statute, or a negotiable note, be indorsed in blank by a third person, at the date of the contract, and be afterwards delivered to the payee, the indorser is not responsible as an original promiser to the payee, without extrinsic evidence to show that such was the design of the indorsement; his liability, in the absence of extrinsic testimony, being only that of an ordinary indorser.....*Ibid*.
 . But if the instrument so indorsed and delivered be not assignable, the payee may hold the indorser liable on the original contract as a surety, unless it appear by extrinsic evidence that the intention of the parties was otherwise.....*Ibid*.
4. In a suit by the payee against the indorser in blank of an assignable instrument, charging the defendant as primarily liable, the instrument and indorsement, though not of

themselves sufficient to sustain the suit, are a necessary part of the plaintiff's evidence.....*Ibid*.

5. To avoid a bond on the ground that it was fraudulently obtained, it should appear that the obligee had an agency in the alleged fraud.—*Jenners v. Howard*.....246
6. The assignee of a bond obtained judgment in time against the obligor, and, after a delay of seven months, took out a *fieri facias* on the judgment. The obligor's real estate, being all the property subject to execution that he owned at the date of the judgment or at any time afterwards, was sold on the execution, and a part of the debt thereby obtained. *Held*, that a suit could not, under those circumstances, be sustained on the assignment.—*James v. Nicholson*.288
7. The holder of a bond for the payment of a specific sum with interest may sue in debt for the principal alone, and need not notice in his declaration the contract for interest.—*McClure et al. v. Cole*.....290

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CHALLENGE TO FIGHT.

The giving of a verbal challenge to fight a duel is an indictable offense.
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CHANCERY.

1. The 18th section of the statute regulating the practice in chancery, which authorizes absent non-resident defendants, within a year, to open decrees rendered against them by appearing and answering the bill, paying costs, &c., applies to the Probate Courts, and all others in the State having chancery jurisdiction.—*Heistand et al. v. Kuns*.....95
2. A bill of revivor and supplement stated who were the parties to the original bill, its object, the proceedings on it, and the abatement, showed the plaintiff's right to revive, charged that the cause ought to be revived and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties to the original bill when the abatement happened, and prayed that the suit

- might be revived, &c. The supplemental matter then followed. *Held*, that that part of the bill which sought to revive the original suit was valid, and, therefore, whether the subsequent part was good or not, a demurrer to the whole bill could not be sustained.—*Flurber et al. v. Ingraham et al.*.....139
3. A sale of land having been made under an order of the Probate Court, on a petition for partition, it was held that a Court of Chancery could not correct a mistake as to the description of the land in the notice, petition, order of Court, &c.—*Mahan v. Reece et al.*.....215
4. The complainant in chancery has a right to an order to examine a defendant as a witness on the trial of an issue, &c., saving just exceptions; and though it is usual to suggest in the petition that the party is not interested, such suggestion is not necessary.—*McPheeters et al. v. McPheeters et al.*.....221
5. The person who is beneficially interested in the object of a bill in equity, and for whose use it is filed should be a party to the suit.—*Park v. Ballentine et al.*.....223
6. A bill in equity ought not to be dismissed for the want of proper parties, but should stand over for amendment.*Ibid.*
7. *A* and *B*, on their discontinuance of business as partners, agreed that *B* should collect the debts of the firm, and that the amount, when collected should be equally divided between them. *Held*, that a bill in chancery afterwards filed by *A* against *B* for the complainant's share of the money collected, was bad on demurrer, for omitting to state the time when the collection was made.—*McCamen v. Gray*.....233
8. A bill of review founded on newly discovered evidence was filed October the 2d, 1832; and the discovery of the new matter was averred to have been made in the summer of 1828. *Held*, that the bill appeared to be filed in time.—*Jenkins v. Prewitt et al.*.....237
9. To authorize the taking of a bill in chancery as confessed for want of an answer, it must appear that the defendant has had notice of the suit.—*Reed et al. v. Glover*.....345
10. A mortgaged certain lands to *B* to secure him against loss as indorser of his, *A*'s, note. A tract of land, intended by the parties to be inserted in the mortgage, was omitted by mistake. Afterwards, certain creditors of *A* obtained judgments against him. *B* paid the indorsed note, which was for a larger amount than the mortgaged lands and the omitted tract were worth; and *A* was insolvent. *Held*, that a Court of chancery might correct the mistake in the mortgage and free the omitted tract from the lien of the judgments.—*White et al. v. Wilson et al.*.....448
11. If after a demurrer for multifariousness to a bill in chancery is overruled, the defendant answer the bill, the objection to it for multifariousness is waived.—*Watson v. Clendennin et al.*.....477
12. A Court of chancery may decree the specific performance of a contract to indemnify the complainant against a pecuniary liability.—*Chamberlain v. Blue et al.*.....491
13. And the circumstance that the performance of the contract is secured by a penalty makes no difference.*Ibid.*
14. Where a person seeks to recover, as on a *quantum meruit*, the value of work done, materials furnished, &c., his remedy, if he have any, is not in chancery but at law.—*McKinney v. Springer et al.*.....511
15. The decision of a Court of law, made in the due exercise of its jurisdiction, can not be revised by a Court of chancery.—*Pichon v. McHenry*. 517
16. A judgment at law in a suit on an appeal bond can not be enjoined by a Court of chancery for the want or failure of consideration of the bond.*Ibid.*
17. One of two makers of a promissory note for \$105 entered himself replevin bail for the payee for \$100 the latter promising in writing that the note should be of no effect if the bail should have to pay the judgment. The payee assigned the note to a person without notice; and the bail, after notice of the assignment paid the judgment. The assignee sued the makers at law on the note. The makers of the note filed a bill in chancery to have the proceedings at law enjoined and the note canceled. *Held*, that the bill should be dismissed.—*Hilliard et al. v. Hanna et al.*.....541

18. A tract of land was sold by a commissioner, appointed for the purpose, on a petition for partition of real estate, and a note taken for part of the purchase-money. *Held*, that a bill in chancery could not be sustained by the commissioner to enforce payment, by a sale of the land, of the purchase-money due.—*West v. Thoraburgh et al.*.....542
9. A defendant in chancery, on filing an answer containing matter in avoidance, is entitled to a continuance in order to take depositions. *Ibid.*

CITIZENS OF THE UNITED STATES.

The law presumes all persons who reside here to be citizens of the *United States* until the contrary appears.—*The State v. Beackno*.....488

CONSIDERATION.

See PROMISSORY NOTES, 3 to 6, 9, 17.

1. The indebtedment of *A* to *B* is not, of itself, any consideration for a subsequent promise by the former to *C* to pay to *C* the amount of the debt.—*Salmon v. Brown*.....347
2. *Semble*, that the consideration of a promise sued on must be alleged in the declaration to have moved from the plaintiff.....*Ibid.*

CONSTABLE.

See JUSTICE OF THE PEACE, 3.

1. In a suit on a constable's bond because of the illegality and insufficiency of the constable's return to a *feri facias*, the declaration should show what the return was which is alleged to be illegal and insufficient.—*Graham et al. v. The State*.....32
2. If a declaration in such suit setting out the condition of the bond, &c., be demurred to, and the demurrer be overruled, the damages should be assessed by a jury.....*Ibid.*
3. In debt on a constable's bond against the principal and his sureties, because of the constable's failure to make the money due on an execution, the declaration must aver that the execution-debtor had goods on which the constable might have levied.—*The State v. Soverns et al.*168
4. A constable's bond is not void merely because the penalty is not fixed, as the statute requires, by the board doing county business.—*The State v. Lynch et al.*.....395

CONSTITUTIONAL LAW.

1. The statute of 1838, which authorizes the presiding judge of one Circuit to preside in and hold a Court for one term, or for a single trial, in another Circuit whose presiding judge is absent, is not unconstitutional.—*Beauchamp v. The State*299
2. The sixth section of the act abolishing imprisonment for debt, approved *January* the 13th, 1842, by which all persons then imprisoned on process in civil cases were discharged, is constitutional.—*Fisher v. Lucky*.....373

CONTINUANCE.

See PLEADING, 8. SCIRE FACIAS, 24.

1. If in a suit on a sealed note, the declaration be so amended as to describe a different note from that previously described, the defendant is entitled to a continuance.—*Wright v. Busge*.....419
2. The defendant's objection to the refusal of a continuance is not waived by a subsequent withdrawal of his plea.....*Ibid.*
3. The defendant's affidavit for a continuance stated that he had been unable to prepare for trial in consequence of severe bodily affliction, under which he had laboured ever since and long before the process was served; that he believed he had a meritorious defense, and could be ready for trial at the next term; and that the affidavit was not made for delay. *Held*, that the affidavit was insufficient.—*Pine v. Pro et al.*.....426

CONTRACT.

1. Debt against *A* and *B* on a sealed note payable the first of *June*, 1837. Plea, that certain land had been bought for the joint use of the plaintiff and defendants, the purchase-money advanced by the former, and the title taken in his name; that the note was given by the defendants for their part (two-thirds) of the purchase-money; that the land was to be sold as soon as it could be done to the satisfaction of a majority; that when the plaintiff should be paid the note, and his part (one-third) of the proceeds, he should convey, &c.; that the land had not been sold, nor had the plaintiff conveyed or tendered a convey-

- ance to the defendants, &c. *Held*, that the plea was insufficient; the defendants' promise to pay the money advanced for them by the plaintiff being independent, &c.—*Robb v. Vicory et al.*.....47
2. Mental incapacity at the time of contracting, produced by drunkenness or any other cause, is a good defense against the contract whether it be by deed or parol.—*Jenners v. Howard*.....240
3. A verbally promised *B*, for a valuable consideration, to board him and his family for a certain time. Afterwards *A*, in a bond to *C*, stipulated, at *B*'s suggestion, to board the latter and his family, for the same time, without charge. *Held*, that an action would lie on the parol contract—*Runnion v. Beard*.....401

CONTRACT, RESCINDING OF.

See VENDOR AND PURCHASER, 2.

The holder of a bond conditioned for the conveyance to him of certain land when the price, payable by installments, shall be paid, can not rescind the contract on account of the obligor's not being ready to convey the land at the time specified by the contract, if he has since accepted a conveyance.—*Comparet v. Hedges*416

CONVEYANCE.

1. A conveyance having been signed, sealed, and acknowledged by a husband and wife in due form, was sent by the former, in presence of the latter, to the recorder's office, to be recorded. *Held*, in an action of disseisin by the grantee, that the conveyance had been legally delivered.—*McNeely et al. v. Rucker*..391
2. A conveyance executed by a *feme covert* can not be avoided by her after her husband's death, on the ground that she had executed it under a misapprehension of her legal rights. *Ibid.*
3. An acknowledgment in the usual form by a *feme covert* of a conveyance before a magistrate estops her and those claiming under her from saying that she had not freely and absolutely executed the conveyance.....*Ibid.*
4. A voluntary conveyance is valid against a subsequent purchaser for valuable consideration with notice;

- and the record of such conveyance is sufficient notice.....*Ibid*
5. If the certificate of the proper officer on a conveyance of real estate, of the acknowledgment of a *feme covert*, show that she acknowledged before him that she had voluntarily executed the conveyance, it is sufficient under the statute of 1824.—*Stevens v. Doe d. Henry*.....475
6. It will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife and the making her acquainted with the contents of the conveyance.....*Ibid.*
7. If the certificate of the proper officer on a conveyance of real estate, of the acknowledgment of a *feme covert*, state that she acknowledged she had voluntarily executed the conveyance, it is sufficient under such statutes on the subject as that of 1824.—*Watson v. Clendenin et al*477
8. Such certificate, however, under the statute in force in 1818, must be under the hand and seal of the officer.....*Ibid.*
9. A conveyance of land situate in *H* county was executed in *G* county, both counties being in this State, and was acknowledged before a justice of the peace of *G* county, a certificate of the clerk of the Circuit Court of the latter county being attached, as the statute requires. *Held*, that the conveyance was legally executed.—*Schoolcraft v. Campbell*.....481
10. A vendee of real estate is not obliged to receive a conveyance executed by an attorney in fact, unless where there is some very strong reason for it—*Dawson v. Shirley*.....531
11. A *feme covert* can not acknowledge a conveyance of real estate by an attorney in fact.....*Ibid*

CORPORATION.

A declaration in debt commenced as follows: *A*, *B*, and others, (naming them), being a body corporate and politic, known by the name of the board of trustees of the *C* county seminary, &c., were summoned, &c. *Held*, that the words "being a body corporate," &c., were a mere *descriptio personarum*. *Held*, also, that if the agreement sued on was binding on the said board of trustees as a corporation, the suit should have been against the corporation in its

corporate name.—*Hay et al. v. McCoy*69

CORPSE, DISINTERMENT OF.

1. A person, without being actually present at the unlawful disinterment of a dead body, may be found guilty of the offense, if, with the intention of giving assistance, &c., he be near enough to afford it, should it be needed.—*Tate et al. v. The State*..110
2. On the trial for such offense, testimony tending to prove the defendant's co-operation, &c., should be referred to the jury.....*Ibid.*
3. Such offense consists not merely in the removal of the dead body, but in its removal without the consent of the deceased, given in his lifetime, or of his near relatives, given since his death.....*Ibid.*
4. An indictment in such case, charging the defendant with removing from its grave a certain deceased child of *N. H. Burke*, "that had yet no name given to it," without the consent, &c., is sufficient.....*Ibid.*

COURT.

A cause having been submitted to the Court, under the statute, stands as if it had been submitted to a jury.—*Henderson v. Barbee*.....26

D

DECEDENT'S REAL ESTATE, EXECUTION AGAINST.

1. Petition filed in the Probate Court against heirs, &c., under the statute, to have execution against the land of an intestate; on a judgment obtained against his administrators. Plea, that the administrators had assets sufficient to pay the debt, consisting of notes payable to them, obtained in part from the sale of the personal property of the deceased, and in part for real estate sold by them, under an order of Court, on a credit not then expired. *Held*, that the plea was good.—*Brown et al. v. Rose et al.*.....69
2. When any portion of the land of a deceased debtor has been sold and converted into assets by his executor or administrator, for the payment of debts, under an order of Court, no other land of the estate can be ordered to be sold on the application of creditors until the

assets so obtained have been exhausted.....*Ibid.*

3. If a petition to have execution against the real estate of a decedent, on a judgment against his executor or administrator, do not make the terre-tenants defendants, or aver there are none, it is defective; and the defect may be assigned for error.—*Williams et al. v. Morehouse et al.*215
4. To a petition for execution against real estate on a judgment against an administrator, a plea that the debtor did not die seised in fee-simple of the lands mentioned in the petition or of any part thereof, is good. And a plea, in such case, that there were terre-tenants on the land who were in possession at the commencement of the suit, is also good. But a plea denying in general terms "each and every allegation in said petition contained," is bad, and may be rejected on motion.—*Armstrong et al. v. Miligan*.....463

DEDIMUS.

1. The name of a justice of the peace of another State need not be inserted in a *dedimus* to take depositions, in order to render his certificate of the taking of a deposition a valid authentication.—*Dumont v. McCracken*.....355
2. Nor does such a certificate require a seal.....*Ibid.*
3. A *dedimus* in a pending suit to take depositions out of the State must be directed to a justice of the peace; but a person only expecting to become a party to a suit, may have a *dedimus* directed to any officer of another State who is there authorized to take depositions.....*Ibid.*

. DEED.

See CONVEYANCE.

DEFAULT.

In case of a judgment by default, the record must show that the defendant had notice of the suit—*Miller v. Bottorff et al.*.....30

DELIVERY-BOND.

1. A bond conditioned for the delivery of goods taken on execution was in the usual form, except that it did not state to whom the property was to be delivered. *Held*, that the legal

- effect of the condition of the bond, that the property should be delivered at the time and place specified, was that it should then and there be delivered to the sheriff. *Held*, also, that a declaration in a suit on such bond, setting out the condition, &c., should aver that the property had not been delivered to the sheriff.—*Eldridge et al. v. Yantes*.....72
2. If, in a suit on such bond, the plaintiff obtain judgment on a demurrer to the declaration, the damages must, in the absence of any agreement of the parties, be assessed by a jury.—*McKay et al. v. Craig*.....168
3. It is no defense to a suit on a delivery-bond that the officer who took it made a false and fraudulent representation to the defendant respecting the time when the property was to be delivered, and that the bond was not read to or by the defendant.—*Seeright v. Fletcher*.....380
4. The taking of a delivery-bond of an execution debtor, and proceedings on it to judgment and execution without obtaining satisfaction, are no bar to a *scire facias* against the replevin bail in the case.—*Young et al. v. Peery*.....399
5. This case is the same with *Eldridge et al. v. Yantes*, ante, 72, and the decision is the same as in that case.—*Fitch v. Schenck*.....401

DEPOSITIONS.

1. If a deposition be improperly suppressed, the party waives the error by introducing another deposition of the same witness, testifying to the same facts.—*Sanders v. Johnson*...50
2. A deposition is not objectionable because the name of the State where it was taken is not given in the caption, if the caption allege the deposition to have been taken agreeably to the annexed commission and notice, and the State be named in the *dedimus* and notice attached to the deposition.—*Atkinson v. Starbuck*, 353
3. Nor is the certificate of the justice to such deposition objectionable for omitting the name of the State in which he is justice, if the certificate, by reference to the caption of the deposition, show the name of such State... *Ibid.*
4. A deposition to prove the copy of a bill of exchange, without accounting for the absence of the original,

or to prove the institution of a suit, and the rendition and contents of a judgment in *Ohio*, was held to be inadmissible.—*Dumout v. McCracken*.....355

DISCHARGE.

1. Debt against a sheriff for an escape on execution. Plea, that the execution-defendant being in custody, &c., made oath that he had no property, &c.; that before the oath was administered, the plaintiff not being resident in the county, the defendant posted up in the clerk's office a written notice of the time and place of taking the oath; and that the execution-defendant was thereupon discharged, &c. *Held*, that the plea was insufficient for not stating that the plaintiff had no agent or attorney in the county, and for not showing that the notice contained the name of the officer before whom the oath was taken.—*Wells v. Rawlings*, 28
2. A discharge, with the plaintiff's consent, of a defendant in custody on a *capias ad satisfaciendum*, operates as a discharge of the judgment. *Aliter*, if the discharge from custody be on account of the plaintiff's non-payment of the jailer's fees.—*Pren-tiss v. Hinton*.....35
3. A debtor arrested on a *ca. sa.* could not, under the statute of 1838, be discharged from custody by delivering to the constable a schedule of property situate out of the State, and swearing that he had no other property subject to execution, &c.—*Webster v. Farley*.....163
4. It is the magistrate's duty, before whom the debtor makes oath in order to be discharged under said statute, to reduce the oath to writing, cause the debtor to sign it, and hand it over to the officer making the arrest, who should make it a part of his return, and append it to the writ.....*Ibid.*
5. A defendant in custody on a *capias ad satisfaciendum* may be discharged without prejudice, under the act of 1841, by the attorney at law for the plaintiff.—*Neff et al. v. Powell et al.* 420

DISSEISIN.

1. In disseisin, as in ejectment, the legal title must prevail.—*Allen v. Smith*527

2. A notice to quit is not necessary in an action of disseisin, if there be no privity between the parties.....*Ibid.*

DOWER.

If a widow who, in her husband's lifetime, had joined with him in the execution of a mortgage of real estate, have not redeemed the mortgage, she has no better claim to dower in the premises than she would have had if the deed had been absolute.—*Watson v. Clendenin et al.*.....477

E

EJECTMENT.

See EVIDENCE, 3, 4, 6, 7.

1. A joint demise by several heirs of real estate is sufficient to support ejectment.—*Robinoe v. Doe d. Colwell et al.*.....85
2. The plaintiff in ejectment must recover on the strength of his own title and not on the weakness of his adversary's.—*Eldon v. Doe d. Wynn et al.*.....341

EQUITY.

See CHANCERY.

EQUITY OF REDEMPTION.

An equity of redemption on a mortgage in fee, whether the mortgagor be in possession or not—provided there be no adverse possession—may be sold on an execution at law.—*Watkins v. Gregory*.....113

ERROR.

See FORCIBLE ENTRY AND DETAINER, 1. INSTRUCTIONS TO JURY, 1, 2. NONSUIT, 2. PARTIES 1, 2. PRACTICE, 10.

1. A defendant can not object to a judgment against him, on the ground that his own pleading is defective.—*Henderson v. Barbee*...26
The overruling of an objection to a leading question put by the plaintiff to one of his witnesses can not be assigned for error unless the record show that the defendant was injured by the answer of the witness.—*Culbertson v. Stanley*.....67
3. The granting or refusing of a new trial may be assigned for error.—*Bisel et al v. Hobbs et al.*.....479
4. The judgment of the Circuit Court

will not be reversed on the weight of evidence, if the evidence be contradictory.—*Kendall v. Hall*.....507

EVIDENCE.

See BAIL, 2, 3. BASTARDY, 5. HUSBAND AND WIFE, 1, 2. PARTNERS 3, 4. PROMISSORY NOTES, 18. SCIRE FACIAS, 16, 23. SLANDER, 1, 2, 3, 6, 7, 8, 15. TRESPASS, 10, 11.

1. An indorsement of a recognizance of bail on a *capias ad respondendum* returned to the clerk's office—the defendant not being a party to the recognizance—is no evidence of the service of the writ.—*Miller v. Bottorff et al.*.....30
2. Appeal to the Circuit Court from the judgment of a justice of the peace in trover. There were, among the papers, two declarations for the conversion of the same property, each laying the damages at \$50.00. Held, that to show that the suit was only for \$50.00, and therefore within the justice's jurisdiction, the plaintiff might prove, by parol, that one of the declarations was filed in the Circuit Court only as an amendment of the other.—*McFarlan v. McJinsey*.....85
3. Possession of real estate is *prima facie* evidence of title, and must succeed until evidence of prior possession or higher evidence of title be produced.—*Robinoe v. Doe d. Colwell et al.*.....55
4. The possession of such property by an ancestor raises a presumption that he was seised in fee, and is sufficient, *prima facie*, to support an ejectment on the demise of his heirs *Ibid.*
5. A duplicate of an assessment roll of taxable property was not admissible as evidence under the statute of 1817, unless verified by the certificate of the clerk of the Circuit Court *Ibid.*
6. If the consent rule in ejectment require the defendant to confess on the trial the possession of the premises, as well as the lease, entry and ouster, it is evidence of such possession as well as of the lease, &c.—*Rawley v. Doe d. Beauchamp et ux.*143
7. If the defendant in ejectment refuse to produce on the trial a patent from the *United States* to the plaintiff's lessor for the land in control

- versy—the patent being in the defendant's possession, and due notice having been given him to produce it—secondary evidence of the contents of the patent would be admissible, without proof of the execution of the original, were proof of its execution otherwise necessary. *Ibid.*
- But extrinsic proof of the execution of such patent is in no case necessary in the first instance. *Ibid.*
- In case of the defendant's refusal as aforesaid, to produce the patent, a copy, whether in the record book of the county or not, proved by a witness on the trial to be a true copy—or a certified copy from the records of the general land office—may be given in evidence. *Ibid.*
10. Copies of process issued by a justice of the peace, and regularly returned, are, when properly authenticated, legal evidence without accounting for the absence of the original.—*Steel v. Pope*.....176
11. The certificate of a justice of the peace that a State warrant issued by another justice is on file in the office of the justice giving the certificate, is *prima facie* evidence that it is legally there; and his certificate that a copy of the warrant is a true copy, is a sufficient authentication. *Ibid.*
12. In a suit on a promissory note payable on demand brought by the payee against the maker, it was held that parol evidence of the plaintiff's declaration at the time the note was executed, that payment of it was not to be demanded until after his death, &c., was inadmissible.—*Graves v. Clark*.....183
13. *Semble*, that a stranger to a record can give it in evidence against the successful party in a subsequent suit against such stranger for the same cause of action.—*Jenners v. Oldham*. 235
14. Debt against the administratrix of *A* on a bond alleged to have been executed by *A*, *B*, and *C*, jointly and severally. Plea, *non est factum*. The defendant offered to prove "that *C* had great influence over *A*; that he had directed his distiller to let *A* have as much whisky as he wanted; and that he, *C*, could lead *A* like a child." *Held*, that the evidence was inadmissible.—*Jenners v. Howard*. 240
15. The county record book of deeds is admissible to prove a conveyance of real estate therein recorded, if offered by a suitor not being a party to the conveyance, nor appearing to have it under his control.—*Foresman v. Marsh*.....285
16. A plaintiff may introduce his book of original entries to show that a note claimed by the defendant as a set-off, had been credited to the latter in an account between the parties, proved to have been previously settled.—*Powers v. Hamilton*.....293
17. On a trial in the Circuit Court of an action of assumpsit commenced before a justice of the peace, receipts and orders of the plaintiff for money, tending to prove payment of the demand, are admissible evidence for the defendant, though no plea have been filed; the evidence being admissible under the general issue, and the defendant in such case being entitled to the benefit of that plea by statute, without pleading it.—*Mahon v. Gardner*.....319
18. The contents of a written instrument can not be proved by a deposition, without accounting for the absence of the original.—*Dumont v. McCracken*.....355
19. The assignee of a promissory note, may, in a suit against the maker for money had and received, give the note in evidence.—*The Ind. Ins. Company v. Brown et al.*.....378
20. *A*, being in partnership with *B*, collected a sum of money in his individual capacity for *C*, and afterwards executed to the latter a note in the name of the firm, for the amount. In a suit against the firm on the note, the plaintiff offered to prove that *A*, during the existence of the firm, had declared that said money had been used by himself and partner in the business of the partnership. *Held*, that the evidence was inadmissible.—*Hickman v. Reineking*.....387
21. The record of a conveyance shown to be a true copy, is admissible evidence for the grantee—satisfactory proof having been given of the loss of the original, and its execution duly proved.—*McNeely et al. v. Rucker*.....391
22. A *subpoena duces tecum* in this cause was served three or four days before the trial on a lessee, requiring him to produce his lease. He was sworn as a witness, and stated

- that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year, &c. *Held*, that the loss of the lease was not sufficiently proved to authorize the admission of parol evidence of its contents.....*Ibid*.
23. Replevin for a horse. Plea, property in a third person. *Held*, that the declarations of such third person that he had sold the horse to the plaintiff, and had no claim to him, were not admissible evidence for the plaintiff.—*Fuller v. Wilson et al.*...403
24. An execution for \$110.43 is not admissible evidence to support an indictment for extortion, charging a constable with having collected more than was due on an execution for \$64.00.—*Seany v. The State*...403
25. In assumpsit against *A* and *B*, the plaintiff offered in evidence a paper purporting to be an answer of *A* to a bill in chancery filed against him and *B* in the *Clark Circuit Court*. There was no proof of *A*'s signature to the paper, nor that it was entitled to the character given to it by the plaintiff. *Held*, that the evidence was inadmissible.—*Johnson et al. v. Pruther*411
26. The declaration of a clerk, since deceased, who had approved and filed a replevin bond, that the surety had been deceived as to its execution, &c., is hearsay, and inadmissible as evidence.—*Doe d. Burge et al. v. Cunningham*.....430
27. The defendant may give in evidence, under the general issue to an indictment, any matter in bar; but matter in abatement must be pleaded.—*Eggleston et al. v. The State*436
28. The admissions of the assignor of a note, made after the assignment, are not receivable in evidence to prejudice his assignee.—*Lister v. Boker*439
29. An indictment charging that the defendant suffered his mare to be run in a certain race, &c., is not supported by evidence that the animal run was a horse.—*Thrasher v. The State*460
30. In a *scire facias* against a constable for a false return of an execution—the return being that the execution was returned by order of the plaintiff—the return is no evidence that the plaintiff gave such order.—*Andrew et al. v. Parker*.....461
31. In debt on a sheriff's bond, the breach assigned was an escape on execution. *Held*, that it was too late, after the issue had been joined, the plaintiff's testimony closed, and a witness examined by the defendants, to permit the sheriff to amend his return to the execution. *Held*, also, that evidence for the defendants of the execution-debtor's insolvency at the time of his arrest and escape was inadmissible. *Held*, also, that the defendants could not introduce parol evidence to contradict the sheriff's return. *Held*, also, that the measure of damages was the amount of the execution and costs.—*Lines et al. v. The State*...464
32. The facts that a note was sent by mail in a letter directed to a postmaster in another State to have its execution proved, and that it had not been returned, do not sufficiently prove the loss of the note to authorize parol evidence of its contents.—*Depew v. Wheelan et al.*.....485
33. A person claimed damages of the State, under the statute concerning internal improvements, because the *Wabash* and *Erie* canal was cut through his land, separating that part of it on which his dwelling house stood from the rest of the tract, and causing a part of his land to be overflowed. *Held*, that the State might prove, to lessen the damages, how much it would cost to build a bridge on the land over the canal, and what would be the expense of draining off the water.—*The State v. Beackmo*.....488
34. On a trial of the right of property taken in execution, the claimant can not give in evidence the declarations of the execution-debtor, the latter being a competent witness for the former.—*Kendall v. Hall*.....507

EXECUTION.

See REPLEVIN, 3, 4.

1. A *capias ad satisfaciendum* commenced as follows: "*State of Indiana, Henry county, ss. To Wm. O. Webster, constable, &c.* *Held*, that this commencement of the writ was sufficient.—*Webster v. Farley*163
2. A note for the payment of money can not, without the defendant's

- assent, be taken and sold on execution.—*Johnson v. Crawford*.....377
3. Whether such sale would be valid, if authorized or assented to by the defendant, *quære*.....*Ibid.*
4. A *fiat facias* was returned levied on certain land which was not sold for want of time. *Held*, that a *venditioni exponas* might issue, under the act of 1818, commanding the sheriff to sell the land. —*Doe d. Burge et al. v. Cunningham*.....430
5. The *levari facias* authorized by the act of 1818 is substantially a *venditioni exponas*.....*Ibid.*

EXECUTORS AND ADMINISTRATORS.

See DECEDENT'S REAL ESTATE, EXECUTION AGAINST.

- Administrators can not be required, against their consent, to appear in the Probate Court and plead to a mere account filed by a creditor of the estate.—*Stewart et al. v. Cantrell*.....74
- If a promissory note be made payable to A, executor of B, and be delivered to A as such executor, the latter may sue on it in his representative capacity.—*Sheets v. Pabody*.
120
- And if A renounce the executorship without having sued on the note, the administrator *de bonis non* of B may sue on it.....*Ibid.*
- An omission in a *scire facias* of *profer* of the plaintiff's authority, when he must sue as executor or administrator, is fatal on special demurrer; but when he can sustain the action in his own right, such omission is immaterial, though he describe himself as executor or administrator.—*Campbell et al. v. Baldwin*.....364
- An executor can sue in his own right on a judgment obtained by him as executor for a debt due to his testator.....*Ibid.*
- The circumstance that a widow has possession of some goods of her deceased husband's estate is not sufficient of itself to render her personally liable to a suit at law for a debt due from the estate, whether she hold the goods under a will of the deceased, or as executrix *de son tort*. —*Chandler et ux. v. Davidson*.....367
- Nor is her *parol* promise in such case to pay the debt obligatory on her personally.....*Ibid.*
- W. F., administrator of the estate

of S., having committed waste, died, and M. F. administered on W. F.'s estate. M. F., R. G. F., and J. A. F., fraudulently appropriated the last-named estate to their own use. The heirs at law of S. obtained a decree in chancery against M. F., R. G. F., and J. A. F. for said waste, &c. *Held*, that the administrator *de bonis non* of S. could neither sue in chancery for said waste, &c., nor enforce said decree.—*Erguson et al. v. Sweeney*.....547

F

FEME COVERT.

See CONVEYANCE, 1, 2, 3, 5 to 8, 11.

FORCIBLE ENTRY AND DETAINER.

- A writ of error lies to a judgment of the Circuit Court, on appeal from the judgment of two justices of the peace, in a case of forcible detainer.—*Barton v. Osborn*.....145
- To sustain a case of forcible detainer, there must be proof that the premises are unlawfully detained by force and violence.....*Ibid.*
- The complaint, in such proceeding showed that the plaintiff had bought the land of the defendant; that the latter, by agreement with the plaintiff, continued in possession until a certain day, and held over after that day by force and strong hand. *Held*, that the complaint was sufficient.....*Ibid.*
- Such proceeding may be supported, under the statute, without proof that the entry was unlawful.....*Ibid.*

FORMER RECOVERY.

- If the plaintiff demur to a plea, and there be judgment against him because his declaration is bad, he may sue again for the same cause of action.—*Sherry et al. v. Foresman et al.*.....56
- Debt against A and B on a joint note alleged to have been executed by them and their deceased partner C. Plea, *nil debet*. *Held*, that the jury might consider the suit barred by a former judgment against C in a suit on the same note.—*Henderson v. Reeves*.....101

FRAUDS, STATUTE OF.

- A receipt for the purchase-money

of real estate may constitute a sufficient agreement under the statute of frauds, provided it show on its face, or by reference to some other instrument, every material part of a valid contract on the subject, but not otherwise.—*Barickman v. Kuykendall*.....21

2. The doctrine of Courts of equity that payment of part of the purchase-money on a parol contract for real estate, and taking possession of the premises under the contract, are such a part performance as takes the case out of the statute of frauds, does not prevail in Courts of law.....*Ibid.*

3. A promise to pay the debt of another must be in writing, by the statute of frauds, to be the foundation of a suit, unless the consideration be sufficient to give to the promise the character of an original undertaking.—*Chandler et ux. v. Davidson*367

FRAUDULENT CONVEYANCE.

See VENDOR AND PURCHASER, 7.

G

GRAND JURORS.

1. An objection to the mode in which the board doing county business discharged its duty as to the selecting and drawing of grand jurors, must be made by way of challenge before the grand jurors are sworn.—*Bellair v. The State*.....104
2. Grand jurors can only serve for one year from the time they are selected.—*Barger et al. v. The State*.....188

GUARANTEE.

1. In a suit against a guarantor for the price of goods sold to another upon the defendant's letter of credit, the person to whom the goods were sold is a competent witness for the plaintiff.—*Smith v. Bainbridge*12
2. If a letter of credit state that the writer will guaranty the payment of goods to be afterwards sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral. In such cases, the person to whom the goods are sold is liable on a general count for goods sold and delivered; but the writer of the letter can only be sued on the special contract.....*Ibid.*

3. To sustain a suit on such collateral promise, the plaintiff must prove that he had, within a reasonable time after the debt became due, demanded payment of the principal debtor, and given notice of his non-payment to the defendant. But even if such proof were not generally necessary to charge the guarantor, still he would not be liable without it if the principal debtor was solvent when the debt fell due, and afterwards became insolvent.
Ibid.

II

HUSBAND AND WIFE.

See JUSTICE OF THE PEACE, 14. REPLEVIN, 12. SCIRE FACIAS, 15.

1. In a suit against husband and wife for a debt due by the wife *dum sola*, the plaintiff can not prove admissions made by the wife after her marriage respecting the debt.—*Brown et ux v. Lasselle*.....147
2. The defendant in a suit for slander brought by husband and wife, pleaded the general issue and several pleas in justification. *Held*, that the marriage of the plaintiffs was admitted by the pleas.—*Rickett et ux. v. Stanley*.....169
3. In a suit against husband and wife, the process need only be served on the husband; and such service being made, the subsequent proceedings should be against both defendants.—*King v. McCampbell*.
435

I

IMPRISONMENT FOR DEBT, ACT ABOLISHING.

See BAIL, 4, 6. CONSTITUTIONAL LAW, 2.

1. A defendant in chancery being in prison on a writ of *ne exeat* to secure his performance of a decree for a pecuniary demand against him, claimed by the bill, was discharged from custody, on motion, under the act of 1842, abolishing imprisonment for debt, no fraud on the subject being shown.—*West v. Walker et al.*.....420
2. If in a suit on a bond for the prison limits, the alleged breach be an escape before the passage of the act of 1842 abolishing imprisonment

for debt, a plea relying on that act is bad.—*Bowen et al. v. Gresham*. 452

INDICTMENT

See PERJURY.

1. An indictment for carrying a pistol concealed, &c., need not state that the pistol was loaded.—*The State v. Duzon*.....51
2. A description of the defendant in an indictment, by the addition of his degree, or mystery, and place of residence, is not necessary in this State.—*The State v. McDowell*.....49
3. An indictment charged the defendant with knowingly retaining in his possession certain dies, and plates, and other apparatus and instruments, made use of in forging &c. *Held*, that the words "other apparatus and instruments," in the indictment, were surplusage. *Held*, also, that to convict the defendant, it must be proved that he knowingly retained in his possession some instrument named in the indictment.—*Peoples v. The State*.....95
4. No illegality of the proceedings of the board doing county business, relative to the selecting, &c., of the grand jurors, is a cause for setting aside an indictment.—*Bellair v. The State*.....104
5. An indictment for betting on the result of an election must state for what purpose the election bet on was held; that is, whether it was for President of the *United States*, for Governor of the State, &c.....*Ibid*. 105
6. An indictment for retailing spirituous liquors within the borough of *Vincennes*, without license by the president and trustees, &c., need not aver the existence of the corporation, nor of an ordinance regulating the sale, &c., nor show the kind of liquor sold.—*The State v. Graeter*. 105
7. An indictment charged that the defendant, as constable, traveled four miles to serve an execution, for which travel he was entitled, as mileage, to sixteen cents; that, corruptly, &c., he extorted thirty-two cents for said mileage; whereas, but sixteen cents were due, &c. *Held*, that the indictment was valid.—*Emory v. The State*.....106
8. An indictment for disturbing a religious society, &c., may charge the defendant, in the same count, with disturbing the society and its members.—*The State v. Ringer* 109
9. Such indictment need not state the name of the society.....*Ibid*
10. An objection to an indictment because the grand jury that found it was irregularly impaneled, must be made by plea, and not by motion to quash.—*The State v. Freeman*.....215
11. An indictment for selling spirituous liquor contrary to the 56th section of the act relative to crime and punishment, should aver that the liquor was sold to be drunk in the house, &c., of the vendor.....*Ibid*.
12. When an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved.....*Ibid*.
13. Indictment for unlawfully winning, &c., by betting on the result of an election. *Held*, that it was no objection to the indictment that the time when the bet was alleged to have been made was after the day of the election.—*The State v. Little*. 267
14. An averment in such indictment that the defendant did unlawfully win of, and take from, one *N. G.* two notes, &c., by betting on the result of the election, shows, with sufficient certainty, that the bet was made with *N. G.*.....*Ibid*.
15. The refusal, without a sufficient excuse, to assist a constable in preventing the escape of a person in his custody, is an indictable offense.—*The State v. Denton*.....277
16. The indictment in such case must show that the defendant was informed of the official character of the constable.....*Ibid*.
17. The caption of an indictment from the Circuit Court represented the grand jurors that found the bill to be "good and lawful men." *Held*, that this was a sufficient description of the qualifications of the jurors. *Beauchamp v. The State*.....299
18. The caption in such case showed, that at, &c., on, &c., the jurors (naming them) appeared in Court, and being duly sworn and charged, &c. *Held*, that the omission of the words "then and there," before the words "sworn and charged," was not material.....*Ibid*.
19. An indictment, if the venue be changed, need not be recorded in the Court in which it was found.*Ibid*.
20. An indictment for obstructing the

execution of a search warrant must show the warrant to be legal; and it must therefore show that the warrant appeared upon its face to be founded on a sufficient affidavit.—

The State v. Twell.....344

21. An indictment charged that the defendant was supervisor of the highways in road-district No. 1, in the township, &c., county, &c.; that he willfully suffered that part of the road running from S, in said county, in the direction of G, in said county, situate in said road-district, to be obstructed, &c. *Held*, that the description of the road was sufficient.—*The State v. Harsh*.....346

22. The *termini* of the road need not be stated in such indictment.....*Ibid*.

23. The indictment in such case need not aver that the defendant had the means to keep the road in repair; his not having such means being matter of defense.....*Ibid*.

24. An indictment against a constable for extortion, charging him with having collected more than was due on an execution, should set out the recital in the execution, showing the judgment on which the execution issued; and the names of both parties to the execution should be alleged.—*Seany v. The State*.....403

25. An indictment was found at the April term, 1841, &c., in substance as follows: That the defendant being a justice of the peace, &c., did, on, &c., at, &c., solemnize a marriage between *Justin Wait* and *Submit Flint*, by virtue of a license issued by the clerk, &c., the said S. *Flint* being a resident of the county, and the parties competent to contract, &c.; and that the defendant having solemnized the marriage, failed and neglected to file in the clerk's office a certificate of the marriage within three months after the same was solemnized, and for a long time thereafter, viz.: for one year, &c. Plea in abatement, that the names of the grand jurors were not selected or caused to be selected by the board doing county business, &c., at their May session, in 1840, from the list of taxable persons, &c. *Held*, that the indictment was good and the plea bad.—*The State v. Cain*, 422

26. A school-commissioner may be indicted for a breach of duty; but the indictment, to be valid, must show

the condition of his bond to be broken. And the breach in such case ought to be so particularly assigned, that the assignment would, were it in a declaration in a suit on the bond, be beyond the reach of a special demurrer.—*Lathrop v. The State*.....502

27. An indictment against such commissioner for failing to make a report to the county auditor of the moneys received and disbursed by him, &c., should contain an express averment that money had been received by the defendant which he was bound to report.....*Ibid*.

28. The day and year when an offense is charged in an indictment to have been committed should be expressed in the indictment in words at length, and not in figures.—*Finch v. The State*.....533

29. Indictments are not within the operation of the statutes of amendment.....*Ibid*.

30. An indictment for retailing spirituous liquors without license need not state the kind of liquor sold.—*The State v. Mullinix*.....554

INDORSEMENT.

See ASSIGNMENT.

INFANTS.

See VENDOR AND PURCHASER, 8.

INQUIRY, WRIT OF.

If a declaration on a promissory note contain the common counts, and there be judgment by default for the plaintiff, there must be a writ of inquiry, unless the parties submit the case to the Court, or a *nolle prosequi* be entered as to the common counts. — *McFarb et al. v. Wilson et al.*....260

INSOLVENT DEBTOR.

A debtor in the prison limits has the same right to apply for the benefit of the insolvent act as if he were in close confinement.—*Babcock v. Cummings et al.*.....265

INSTRUCTIONS TO JURY.

1. The refusal of instructions to the jury (the record not showing them to be applicable to the case) can not be assigned for error.—*Amick v. O'Hara*.....258
2. An erroneous instruction to the jury

can not be assigned for error if the verdict is sustained by the evidence.

Ibid.

3. Special charges to a jury, which are included in a general charge previously given, should be refused.—*Gentry v. Baggis et ux*.....261
4. The refusal of an instruction to the jury (the record not showing that the instruction was applicable to the case) will be presumed to be correct.—*Fuller v. Wilson et al*.....403

INTEREST.

See BOND, 7.

INTOXICATION.

See CONTRACT, 2.

J

JOINT AND SEVERAL.

An account consisting of various items was filed as a cause of action against A, before a justice of the peace. Plea in abatement that the promises, if any, were made jointly with B. *Held*, that proof that one of the articles was on the joint account of the defendant, and B sustained the plea.—*Vanslyke v. Gilmore*.....511

JUDGMENT.

1. Debt for \$127. Two counts; the first showing no cause of action, and the second claiming only \$27.00. *Held*, that a judgment in favour of the plaintiff for the amount claimed by both counts was erroneous.—*Hay et al. v. McCoy*.....69
2. The judgment in this case not showing against whom it was rendered, the writ of error was dismissed.—*Robinson v. Tousey*.....256
3. The assignor of a judgment has no control of it, nor of an execution on it taken out by the assignee; and if the sheriff, with notice of the assignment, fail to discharge his duty relative to such execution, by order of the assignor, he is liable to a suit therefor for the use of the assignee.—*The State v. Herod*.....444
4. A defendant pleaded guilty to an indictment for selling spirituous liquors without license, and the Court fined him \$2.00, saying nothing as to the costs. *Held*, that the costs of prosecution should, in such case, be included in the judgment.—*The State v. Smith*.....549

JURISDICTION.

See JUSTICE OF THE PEACE, 1, 3, 15, 16, 18 to 21. SURETY, 2.

1. The Circuit Court has not original jurisdiction to enforce the daily penalties incurred by suffering obstructions to remain in highways.—*Alldrich v. Hawkins et al*125
2. These penalties can only be sued for before justices of the peace.....*Ibid.*
3. If a statute create a new offense or cause of action, and provide that a particular tribunal shall take cognizance of it, no other Court can enforce the law.....*Ibid.*
4. In a suit before a justice of the peace for less than \$20.00, the defendant claimed as a set-off \$30.50, and the plaintiff obtained judgment for a part of his demand. An appeal by the defendant to the Circuit Court being dismissed, he sued out a writ of error, and obtained a *supersedeas*. *Held*, that the Supreme Court had jurisdiction of the cause.—*Payne v. Miller*.....178
5. The Probate Court has no jurisdiction in suits by or against executors, administrators, or guardians, unless the amount in controversy exceed \$50.00, except where a demand against an executor or administrator is filed at his request, &c.—*Brown v. McQueen*.....208
6. The want of jurisdiction in such case may be shown under the general issue.....*Ibid.*
7. A State Court has no authority to set aside a decision of the register and receiver of a *United States* land office, respecting a pre-emption right to public land, for mere error of opinion.—*Stewart v. Haynes*.....354
8. If a party be aggrieved by a decision of the Circuit Court in dismissing an appeal from a justice's judgment, the amount in controversy in the appeal dismissed, not being less than \$20.00, exclusive of interest and costs, his only remedy is by appeal or writ of error to the Supreme Court.—*Pichon v. McHenry*.....517
9. If a marshal levy an execution of a Federal Court on the goods of a stranger to the execution, he violates the laws of the State, and may be sued in its Courts by the injured party, in trespass or trover, for the damages sustained.—*Hanna v. Steinberger et al*.....520
10. The owner of the goods may also,

- in such case, sustain an action of replevin against the marshal; or he may file his claim to the goods before a justice of the peace, and have the right of property tried under the statute.....*Ibid.*
11. The Probate Court has no jurisdiction in the case of a bill in chancery to enforce a vendor's lien on real estate for unpaid purchase-money.—*West v. Thornburgh et al.* 542
12. Probate Courts have concurrent jurisdiction with the Circuit Courts in actions by or against administrators, &c., in which the amount in controversy exceeds \$50.00.—*High v. Taylor*.....555

JURY.

The State, on the trial of a capital case, has three peremptory challenges; and they may be made at any time between the appearance and swearing of the jury.—*Beauchamp v. The State*.....299

JUSTICE OF THE PEACE.

See PLEADING, 47, 48, 53. REPLEVIN, 6, 7. SURETY, 2.

1. Though a note filed before a justice of the peace as a cause of action, be, on its face, for a sum beyond his jurisdiction, yet if the amount actually demanded and recovered be within it, the presumption is that the note had been so reduced by credits as to authorize the justice, under the statute, to take cognizance of the cause.—*Remington v. Henry*. 63
2. The transcripts of two judgments of a justice of the peace, written on the same sheet of paper, may be authenticated by one certificate of the justice, including in its terms both transcripts.....*Ibid.*
3. A constable may sue in a justice's Court, by notice and motion, for the price of goods sold by him on execution, with ten per cent. damages, if the demand do not exceed \$100.—*Steepleton v. McNeely*.....76
4. A *capias ad respondendum* was the proper process in suits in a justice's Court, under the statute of 1838, when the defendant was not a resident and householder in the county. And the justice could issue such writ in case of the defendant's non-residence, without an affidavit of that fact being filed.—*McFarlan v. McJinsey*.....85
5. When such writ was issued by a justice, it was presumed to have been correctly issued until the contrary was shown.....*Ibid.*
6. A suit in a justice's Court was entitled "*Allen Hamilton, Executor of James Wilcox, v. Charles W. Ewing. Debt. Demand, \$31.00.*" And a promissory note given by the defendant to *James Wilcox*, for \$50.00, was filed as the cause of action. *Held*, that the cause of action was insufficient.—*Hamilton v. Ewing*. 85
7. The cause of action filed before a justice of the peace, in debt against a constable and his surety, was a copy of an instrument of writing, purporting to be executed by the defendants, in the form of a constable's bond, (except that it was not sealed), with an assignment of breaches of the condition appended to it. *Held*, that the cause of action, under the statute, was sufficient.—*The State v. Mowbray*.....89
8. In a suit in a justice's Court against a constable and his sureties, on a bond conditioned, &c., the bond, without an assignment of breaches, may be filed as the cause of action. *Olds et al. v. The State*.....91
9. If a justice of the peace, without any authority by law, appoint a constable, and take his bond with surety for the discharge of his duties, the appointment and bond are void. *Ibid.*
10. *A, B, and C* commenced a suit in a justice's Court, describing themselves as late traders under a certain firm, and filed a note executed by the defendant to the firm as their cause of action. Plea, admitting the plaintiffs to be the payees of the note, but alleging, &c. Cause transferred to the Circuit Court. *Held*, that the objection, if any, to the note as a cause of action, was cured by the admission in the plea.—*Wilson v. Merkle et al.*.....118
11. If either party in a justice's Court require proof of the execution by himself of a bond, &c., its execution must be denied on oath.....*Ibid.*
12. When a written contract between the litigating parties is filed as the cause of action in a justice's Court, the want of an averment of extraneous facts connected with the contract and necessary to be proved on the

- trial to sustain the action, is not a fatal objection, if enough be stated to bar another suit for the same demand.—*Cook v. Hedges*.....184
13. A term for years in real estate may be sold on an execution from a justice's Court.—*Barr v. Doe d. Binford*.....335
14. A judgment confessed before a justice of the peace, without the oath prescribed by statute, is good against the party confessing it. And if such party, being a *feme sole*, afterwards marry, the judgment is also good against her husband.—*Campbell et al. v. Baldwin*.....364
15. A suit before a justice of the peace can not be sustained if the amount claimed exceed \$100.—*Chandler et ux. v. Davidson*.....367
16. Justices of the peace have jurisdiction in replevin when the value of the property sued for does not exceed \$50.00, though the damages claimed for the detention exceed \$20.00.—*Middleton v. Harris*.....397
17. Assumpsit in a justice's Court. The declaration stated, in substance, that the defendant had received from the plaintiff certain bottles of cough drops at a certain price, to be sold for him or returned; and that payment for such as had been sold, and a return of the residue, had been demanded and refused. *Held*, that the declaration was sufficient.—*Crosby et al. v. Tichenor*.....418
8. In debt before a justice of the peace, a delivery bond, in the penalty of \$208, was filed as the cause of action; the value of the property to be delivered not being stated, and there being no statement limiting the demand to \$100, or less. *Held*, that the justice had no jurisdiction.—*Beard et al. v. Kinney et al.*.....425
19. The jurisdiction of a justice of the peace, under the act regulating distress for rent, is not limited to any amount.—*Ezra v. Manlove*.....454
20. The justice may take bail for the stay of execution on a judgment rendered for any amount against the tenant in such case, and issue a *seire facias* against the bail as in other cases.....*Ibid.*
21. In a suit by the State on the relation, &c., on a justice's bond, the breach assigned was that the justice had rendered judgment in an action of debt in favour of the relator,

- against one *R.*, for \$95.87 and costs that the justice had improperly taken replevin bail, &c., and neglected to issue execution, &c. *Held* that the declaration sufficiently showed that the justice had jurisdiction of the suit against *R.*, it appearing that the action was debt, and the amount recovered less than \$100.—*The State v. Hook*.....515
22. In a suit on a justice's bond for neglecting to issue an execution, a plea that, at the time of the judgment, and ever since, the execution-defendant was insolvent, is insufficient.—*Noel et al. v. The State*...523
23. But in such suit, the execution-defendant's insolvency at the time of the judgment, and afterwards, may be proved in mitigation of damages.....*Ibid.*

L

LAW, KNOWLEDGE OF, PRESUMED.

It is considered that every person is acquainted with the law, both civil and criminal; and no one can, therefore, complain of the misrepresentations of another respecting it.—*Platt v. Scott*.....389

LETTERS TESTAMENTARY.

Letters testamentary, in the form prescribed by statute, which, when granted, were entered of record in the Probate Court, and were afterwards, when delivered to the executor, certified by the clerk to be true copies of the record, were held to be valid as being the original letters.—*Bales et al. v. Binford et al.*.....415

LIBEL.

An affidavit made before a magistrate to enforce the law against a person accused therein of a crime, does not subject the accuser to an action for a libel, though the affidavit be false and insufficient to effect its object.—*Hartsock v. Reddick*.....255

LIEN.

See VENDOR AND PURCHASER, 10, 17

1. The person who builds a boat, &c., agreeably to his contract with the owner, &c., has a lien on the boat, under the statute, for the price, whether he has paid the workmen that assisted him and were em-

ployed by him or not; but the workmen so employed by the contractor have no such lien for their wages. — *Southwick v. The Packet Boat Clyde*.....148

2. Whether, in case of such claim by the contractor, evidence of an unsuccessful attempt by him and the owner, &c., to settle, &c., is sufficient to show the demand and refusal of payment required by the statute, &c., is not for the Court but for the jury to determine.....*Ibid.*
3. The contractor in such case can only recover, in the absence of a special contract, the value of the work, &c.; at the place where the boat was built; the performance of which work, &c., must be proved. *Ibid.*
4. Ejectment. The lessor of the plaintiff claimed the premises in dispute, as a purchaser under an execution on a judgment in his favour against one *S.* The defendant claimed the premises as a prior purchaser, under an execution issued, before the lessor's, on a judgment rendered against *S.* at the same term with the other, but a few days later. The lessor's execution was issued and delivered to the sheriff a short time before the defendant's purchase, of which the latter had notice. *Held*, that the plaintiff was entitled to recover. — *Whitney v. Rightclaim d. Southwick et al.*.....322
5. A person can not avail himself of the benefit of the statute giving mechanics a lien on buildings, who has not commenced his suit within a year, &c., and filed in the recorder's office due notice, &c., as the statute requires. — *McKinney v. Springer et al.*.....511

LIMITATIONS, STATUTE OF.

1. Matter pleaded as a set-off is not, to the amount of the plaintiff's demand, barred by the statute of limitations; but to so much of the set-off as exceeds the plaintiff's demand, the statute is a bar. — *Livingood v. Livingood et al.*.....268
2. To a suit commenced in October, 1840, on a single bill dated the 1st of November, 1833, and payable six years and nine months after date, the defendant pleaded payment and set-off. The plaintiff replied that the matter of set-off did not accrue within five years next before the 1st

of November, 1833. *Held*, on general demurrer, that the replication was insufficient.....*Ibid.*

LIQUIDATED DAMAGES.

See PENALTY.

M

MALICIOUS PROSECUTION.

If in an action for maliciously indicting the plaintiff, &c., it appear that a *nolle prosequi* to the indictment had been entered, and a judgment thereupon rendered that the defendant "go hence, thereof acquit, without day," the acquittal is sufficient to warrant the suit. — *Chapman v. Woods*.....504

MECHANICS

See LIEN, 5.

MESNE PROFITS.

See BAIL, 1.

MONEY HAD AND RECEIVED.

A was appointed a county treasurer for the year 1838; and, during his term of office, he and his deputy received a part of the county revenue in county orders. In 1841, the board of county commissioners brought an action for money had and received against *A* for the amount so received, he having failed to account for the same to said board. *Held*, that the action would lie. — *Helvey v. The Board of Commissioners of H. County*.....317

MORTGAGE.

See VENDOR AND PURCHASER, 16.

1. An absolute conveyance of real estate, and the grantee's bond of the same date for a re-conveyance to the grantor on his payment of a certain sum of money, amount to a mortgage. — *Watkins v. Gregory*.....113
2. If the money in such case be duly paid, and the grantee refuse to re-convey, he is liable to a suit on the bond.....*Ibid.*
3. A mortgage of personal property may be acknowledged or proved before the recorder of the county. — *Hamilton v. Mitchell*.....131
4. A mortgaged certain goods to *B*, but was to continue in possession of them, by the terms of the contract,

for a definite time. An execution against A, in favour of a third person, was afterwards levied on the same goods in A's possession; and B filed a claim to them under the statute regulating the trial of the right of property, but the time for which A was to possess the goods had not expired when the claim was filed. *Held*, that the claim could not be sustained, the claimant not having a right to the immediate possession of the goods.....*Ibid*.

5. If the *proviso* or condition of a mortgage do not contain an express covenant, it will not sustain an action either of debt or covenant.—*Smith v. Stewart*.....162

6. The holder of a certificate for canal land, on which part of the purchase-money had been paid, executed a mortgage on the land. *Held*, on a bill of foreclosure, &c, that the canal commissioners need not be parties to the suit; that the interest of the holder of the certificate might be mortgaged; and that it was not necessary that a decree in the case for the complainant should direct the certificate to be delivered to the purchaser under the decree.—*Miller et al. v. Tipton et al.*.....238

7. If a person indebted by notes payable at different times give a mortgage of goods to secure the payment of the notes as they shall severally arrive at maturity, the goods in the mean time to remain in the possession of the mortgagor, the mortgagee, on default of payment of either of the notes when due, is entitled to the possession of the goods.—*Burton v. Tannehill*.....470

8. If, after any such default, the mortgagor mortgage the goods to a third person, with notice, the latter, if he take and convert the goods to his own use, is liable for them in trover to the first mortgagee.....*Ibid*.

9. A mortgagee of goods does not, by recovering a judgment for the mortgage-debt, waive his lien on the goods.....*Ibid*.

MURDER.

The following instructions, the same being relevant to the case, were given to the jury: If homicide be committed in a sudden heat by the use of a deadly weapon, no provocation given by mere words will reduce the killing to manslaughter.

The question should never be, was there anger merely? but, was there legal provocation to such anger? The use of a dangerous weapon under a provocation by words only, or under no provocation, is always evidence of malice aforethought. To constitute malice aforethought, it is only necessary that there be a formed design to kill; and such design may be conceived at the moment the fatal stroke is given, as well as a long time before. Malice aforethought means the intention to kill; and when such means are used as are likely to produce death, the legal presumption is that death was intended. *Held*, that these instructions were correct.—*Beauchamp v. The State*.....299

N

NE EXEAT.

A writ of *ne exeat* should be made returnable to the first day of the term next after it issues.—*Crocker v. Dutton*.....535

NEW TRIAL.

1. A party asking for a new trial on account of the discovery, since the trial, of a will material, &c., must show that, before the trial, the will had been searched for in the probate office.—*Robinoe v. Doe d. Colwell et al.*.....85

2. A verdict shown by the record to be right will not be set aside on account of an erroneous instruction to the jury.—*Andre v. Johnson*.....375

3. It is no ground for a new trial that a witness for the party asking it, who had been excused from testifying on the trial which had taken place because his evidence might subject him to a penalty, has promised to give evidence in the cause if a new trial should be granted.—*Lister v. Boker*.....43

4. A new trial is never granted on account of newly discovered evidence, when, by diligence, the party might have previously had the benefit of the evidence.—*McIntire et ux. v. Young*.....496

5. And such trial is rarely, if ever, granted on account of newly discovered evidence, if the only object of the evidence be to impeach the character of a witness.....*Ibid*

NONSUIT.

1. A party who voluntarily suffers a nonsuit as to one count can not complain of any error in the proceedings under that count.—*Kelsey v. Ross et al.*.....536
2. If a plaintiff suffer a nonsuit in consequence of an erroneous exclusion of his evidence, he is not entitled to a writ of error.—*Vestal v. Burditt et al.*.....555

NOTARY PUBLIC.

The authentication of a notary public must be under his official seal.—*Dumont v. McCracken.*.....355

NOTICE.

See DISSEISIN, 2. PROMISSORY NOTES, 19 to 22.

NUISANCE.

A public and disorderly liquor and store house in a town, in and about which dissolute persons are permitted, for lucre, to remain at night and in the daytime, drinking, tippling, carousing, swearing, hallooing, &c., to the damage, disturbance, &c., is a public nuisance, and the keeper of it is indictable.—*The State v. Bertheol.*.....474

O

OVERSEERS OF THE POOR.

The children of living parents can not be interfered with by the overseers of the poor, or the Probate Court, unless their parents be found unable to maintain them.—*Stanton v. The State.*.....83

OYER.

See WRIT.

P

PARTIES.

See CHANCERY, 5. PROMISSORY NOTES, 1, 26. SCIRE FACIAS, 8.

1. If from the judgment of a justice of the peace against several defendants, some of them appeal to the Circuit Court in their own names, without joining the others, the appeal should be dismissed on motion.—*Kain v. Gradon*138
2. The appeal from such judgment should be taken in the names of all

the defendants who are living, and are aggrieved by the judgment; and if any of those in whose names the appeal is taken afterwards refuse to unite with the others in its prosecution, they should be summoned and severed.....*Ibid.*

3. The treasurer of a school district could not, under the statute of 1838, sue in his own name for money due to the district.—*Crawford v. Dean.* 181

PARTITION.

1. To obtain an order for a partition of real estate when the defendants make default, the applicant must show his title to the Court, and prove that the defendants are owners in common with him of the premises.—*Shaw et al. v. Parker.*345
2. The order for a partition in such case should ascertain and declare the respective proportions of the common owners of the premises, and direct the commissioners to make partition accordingly, and to assign and deliver to each his share. *Ibid.*

PARTNERS.

See ATTACHMENT, 4, 5.

1. If one of two partners, in the presence of the other and with his consent, subscribe the names of both to a note and put a seal to it, it is the deed of both.—*Henderson v. Barbee.* 26
2. If a creditor of one of several partners take a bill or note from his debtor, in the name of the firm, for his debt, without the knowledge of the other partners, he can not sue the firm on such bill or note.—*Hickman v. Reineking*387
3. The defendant's acknowledgment of the partnership of the plaintiffs is sufficient evidence of such partnership.—*Bisel et al. v. Hobbs et al.* 479
4. In a suit against partners in a distillery and in the purchase of corn, the plaintiff may give in evidence the receipt of one of the defendants, acknowledging the delivery of a certain quantity of corn to him by the plaintiff.....*Ibid.*
5. If goods be purchased by a partner for the use of the firm, the seller may sue the partners for the price, though he did not know at the time

of the sale of the existence of the firm.....*Ibid.*

PATENT-RIGHT.

If the assignment of a patent-right be not recorded in the office of the Secretary of State of the *United States*, a note given to the assignee for such right is invalid for the want of consideration.—*McFall et al. v. Wilson et al.*.....260

PAYMENT.

The payment of a debt in treasury notes of the State, at par, which had recently depreciated in value, is good, if the payer did not know of the depreciation, or if both parties knew, or had the same means of knowing, the value of the notes, and the payment was made in good faith.—*Ridenour et al. v. McClurkin*...411

PENALTY.

A covenanted with *B* to procure and deliver to him, within a limited time, the certificate of third persons to a certain effect, and stipulated that if he failed to do so, he would pay him \$500 liquidated damages. *Held*, that the sum of \$500 was not in the nature of a penalty, but was the measure of damages as agreed upon by the parties.—*Hamilton v. Overton et al.*.....206

PERJURY.

An indictment for perjury charged the defendant with making an affidavit that a certain boat was, as he believed, attempting to pass a certain place, &c., whereas he did not believe that the boat was attempting to pass said place, &c. *Held*, that the indictment was not objectionable for not alleging that the boat was not attempting to pass the place, &c.—*The State v. Cruikshank*.....62

PLEADING.

See APPEAL-BOND. CONSTABLE, 1. DELIVERY-BOND, 5. PROMISSORY NOTES, 9, 24, 25, 29. SLANDER, 10. TRESPASS, 8, 9. USURY, 1, 6.

1. If a declaration contain one good count, a demurrer to the whole declaration should be overruled.—*Dillon et al. v. The State Bank*.....5
2. Assumpsit on a promise of the defendant's intestate; plea, that the defendant did not promise, and is-

sue. *Held*, that the issue was immaterial. *Held*, also, that a replication to a plea of payment by the defendant's intestate, that the defendant did not pay, is bad. *Held*, also, that as the declaration only claimed money paid to the intestate, evidence of money paid to the defendant was inadmissible.—*Barickman v. Kuykendall*.....21

3. If one of several replications to a plea of payment and set-off be good, it is sufficient to sustain the action.—*Hurd v. Earl*.....39
4. To a plea of payment and set-off, relying upon a note executed by the plaintiff to a third person, and assigned to the defendant, the plaintiff may reply that the assignment was obtained by fraud.....*Ibid.*
5. An action of debt was brought by the State, on the relation of *Aker*, on a bond for the payment of money. The bond shown on *oyer* was conditioned that a certain collector should faithfully discharge his duties, &c. *Held*, on demurrer, that the declaration was not objectionable for not setting out the condition and breaches. *Held*, also, that the declaration not setting out the condition, &c., need not show that the relator was beneficially interested in the suit.—*The State v. Kizer et al.*.....14
6. A plea professing to answer a part of the cause of action, and being an answer to such part, though not drawn with technical accuracy, ought not to be rejected on motion.—*Culbertson v. Stanley*.....67
7. Counts in trespass *de bonis asportatis* and in trover may be joined, under the statute, in suits commenced before justices of the peace. *Aliter*, in suits in the Circuit Court.—*Earl v. Hamilton*.....77
8. Debt on a bond shown on *oyer* to be conditioned for the collection of taxes. Plea of performance, and replication assigning breaches. Special demurrer to the replication for being double and argumentative, and for not showing a sufficient assessment roll and precept. *Held*, that the assignment of several breaches did not render the replication double; that a demurrer to it for being argumentative should show how it was argumentative; and that a legal duplicate of the assessment roll and a good precept were shown. *Held*, also, that the

- filing of a replication, assigning breaches in such case does not entitle the defendant to a continuance.—*Vance et al. v. The State*.....80
9. Declaration in debt by the *Madison Insurance Company*, stating that the defendant made and delivered to them his promissory note, and thereby "promised to the order of the *Madison Insurance Office*, (thereby meaning and intending to make the said note payable to the order of the plaintiffs), &c." *Held*, that the declaration, for want of a direct averment that the defendant promised the plaintiffs by the name of the *Madison Insurance Office*, was insufficient.—*The Madison Insurance Company v. Stangle*.....88
10. The office of an *innuendo* is not to introduce new matter into pleading, but to explain something which precedes it.....*Ibid*.
11. If a plea profess to answer the whole cause of action, and only answer a part, it may be demurred to generally.—*Howk v. Pollard*.....108
12. Debt on a note for the payment of money. Plea in bar of the action, that the note was given in consideration that the payee would assign to the defendant certain certificates for three tracts of land, each tract containing eighty acres; that the payee did not assign the certificates for the tracts of land containing eighty acres each; wherefore, &c. *Held*, that the plea was a *negative pregnant*, and therefore bad on special demurrer.....*Ibid*.
13. If to a plea of no consideration as to part of a note sued on, the plaintiff reply that the note was not made without consideration, the replication is bad.....*Ibid*.
14. A substantial defect in a declaration may be cured by admissions in the plea.—*Watkins v. Gregory*...113
15. If a declaration contain one good count, a demurrer to the whole declaration can not be sustained.—*Bishop et al. v. Yeazle*.....127
16. If a plea profess to answer only a part of the cause of action, it can be considered as an answer only to that part, though it contain a legal defense to the whole declaration.—*Cross v. Watson et al*.....129
17. And in case of such plea, the plaintiff may, before he replies to the plea, or afterwards, during the term at which the plea was filed, take judgment by *nil dicit* for the part not mentioned in the beginning of the plea.....*Ibid*.
18. Debt by the assignee against the maker of a promissory note. The declaration set out the assignment as follows: "The said *S* (payee) afterwards, and before the payment of said sum of money in said promissory note specified, viz.: on, &c., at, &c., indorsed said note by indorsement thereon under his hand, and then and there delivered the same to the plaintiff, yet the defendant, &c." *Held*, on general demurrer, that the declaration showed with sufficient certainty that the note had been assigned to the plaintiff.—*Cushing v. Mendall*.....153
19. The declaration in a suit on a promissory note by a person not the payee, against the maker, must aver an assignment of the note by the payee.—*Harter v. Ellis et al*.....154
20. An averment in the declaration in such case that the payee assigned the note to the plaintiff, is equivalent to an averment that the assignment was made on the note to the plaintiff under the hand of the assignor, and is sufficient.....*Ibid*.
21. Counts in contract and tort can not be joined.—*Bodley v. Roop*...158
22. A misjoinder of counts may be taken advantage of by demurrer, in arrest of judgment, or on writ of error.*Ibid*.
23. The plea of *nil debet* to debt on a specialty is bad on general demurrer.—*Smith v. Stewart*.....162
24. In a suit on a bond conditioned for the performance of covenants, the plaintiff may declare as on a common bond, without setting out the condition, &c.—*The State v. Leonard et al*.....173
25. The declaration in a suit on the bond of a collector of taxes, after setting out the condition, stated that an assessor was appointed by the board of commissioners, &c.; that he gave bond and took the oath required by law; that he made an assessment of the taxable property in the county, and delivered a list to said board, who corrected it, &c., and fixed the ratio; that the clerk made out and delivered to the collector a proper duplicate of the roll and tax list, &c., with a precept commanding him, &c.; that the latter failed to collect, &c. *Held*, that the performance of the duties of the

- assessor and clerk was shown with sufficient certainty.....*Ibid.*
26. It is not necessary in pleading to state that which is merely matter of evidence*Ibid.*
27. Counts in trespass *quare clausum fregit*, and for an assault and battery, may be joined.—*Arnold v. Maudlin et al.*.....187
28. If some of the breaches assigned in a declaration in debt, on bond conditioned for the performance of covenants, be good, and the others not, a demurrer to the whole declaration must be overruled.—*Rock v. Gordon et al.*.....192
29. Declaration in debt on a sealed note for the payment of a certain sum of money at a future day, with interest, the note stating that if the interest were not punctually paid annually, the principal to be immediately payable; averment, that a year's interest was due and unpaid, wherefore, &c. The note, as shown on *oyer*, agreed with the description of it in the declaration, except that it set out the consideration, which was a certain tract of land, and stated that if the interest were not punctually paid annually, or the obligor should sell the land before the note fell due, the note was to be immediately payable. *Held*, that the variance was not material, and that the declaration, the note being considered a part of it, was substantially good.—*Vandevender et al. v. Pittsford*.....197
30. Debt on the bond of a collector of State and county revenue. Two counts; the first did not name the condition, the second set it out and assigned breaches. Plea of performance, after *oyer*, to the first count, and a replication to the plea, assigning breaches. Special demurrer to the second count, and to the replication. *Held*, as to the second count—1, That an averment that the assessment roll had been returned under oath was unnecessary, it appearing that the assessor had taken an oath of office; 2, That the statute prescribes no time within which the collector's bond should be approved; 3, That an averment that the alleged acts of the board of commissioners appeared of record, was not necessary. *Held*, also, that the replication which charged that the collector had received the duplicate and precept from the proper officer, had collected a certain amount of State revenue which he had not paid over, &c., and had failed to return the duplicate and precept, was not objectionable because it showed the duplicate to be erroneous, nor because it stated the precept to have the seal of the Circuit Court, instead of that of the board of commissioners.—*The State v. Johnson et al.*.....217
31. Debt on a promissory note by the assignee of the payee against the maker. Plea, that the note was given in consideration of the purchase, by the defendant from the payee, of a certain tract of land; that the latter, at the time the note was given, executed to the former a bond conditioned for a conveyance of the land to him on the day the note was payable; and that no deed had, on that day or at any other time, been made or offered to be made. *Held*, that the plea was good. *Held*, also, that a general replication to such plea, that the consideration had not failed in manner and form, &c., was sufficient.—*Holeman v. Lamme*.....222
32. Assumpsit against an administrator on the promise of his intestate. Plea, not guilty. *Held*, on general demurrer, that the plea was insufficient.—*Morrison v. Kelly*.....224
33. *Semble*, that a plea in bar of the action generally, which contains only matter of defense that occurred after the commencement of the suit, is bad on general demurrer.—*White et al. v. Guest*.....228
34. A declaration on a written instrument must set out the instrument either *in hæc verba* or according to its legal effect.....*Ibid.*
35. A declaration professing to give the legal effect of a general recognizance of special bail, taken on the back of the writ, must give it the meaning prescribed by statute, which is the same as that of a regular recognizance of special bail.....*Ibid.*
36. Matter of law can not be pleaded in bar of an action.—*Scott v. Brockaw*.....241
37. A plea *puis darrein continuance* is a waiver of all previous pleas..*Ibid.*
38. To a plea of failure of consideration, in a suit on a promissory note, a general replication that the consideration had not failed, as alleged,

- is sufficient.—*McFall et al. v. Wilson et al.*.....260
39. A declaration in debt on a justice's bond set out the condition, and assigned as a breach, that the justice had failed to discharge his duty by failing to issue an execution on a certain judgment. Plea, that the justice had not failed to discharge his duty, as alleged in the declaration. *Held*, on general demurrer, that the plea was good, but that it might have been specially demurred to as argumentative.—*The State v. Scott et al.*.....263
40. Debt by an assignee against the maker of a promissory note. *Held*, that the note and an assignment in full might, by statute, be filed in the place of a declaration.—*Halsey v. Hazard*.....265
41. The plaintiff in such suit may prove (the note not being indorsed as filed) that he had, ten days before the term, delivered the note and assignment to the deputy clerk, to be filed in lieu of a declaration; and the Court may direct the clerk to mark the note as filed on the day it was delivered to his deputy..*Ibid.*
42. A plea beginning in bar and concluding in abatement, is a plea in bar.—*Lowe et al. v. Blair et al.*.....282
43. *Scire facias* issued by a justice of the peace against bail entered on the justice's docket for the stay of execution, &c. Plea, that the defendant did not become docket-bail for the stay of execution, &c., as alleged in the *scire facias*. *Held*, that the plea was substantially a plea of *non est factum*, and, if sworn to, was admissible; but that if not sworn to, it should be rejected on motion.—*Merkle v. Bolles et al.*....288
44. A demurrer to a declaration containing one good count should be overruled.—*James v. Nicholson*..288
45. A declaration in *indebitatus assumpsit* stated that, whereas, the defendant on, &c., was indebted to the plaintiff in the sum of \$181, for work and labour, &c.; and was also indebted to the plaintiff in the further sum of \$181, for goods sold, &c.; the defendant afterwards, in consideration of the premises, promised to pay, &c.; yet, &c. *Held*, that this was one count only, and good on general demurrer.—*Hagerty v. Wood*.....292
46. Assumpsit against the president and trustees of the town of *Connersville*. The first count was on a promissory note alleged to have been given for the price of a fire engine; the others were for the price of a fire engine sold and delivered. *Held*, that a plea that the engine was wholly useless and of no value whatever, wherefore the consideration had failed, was bad. *Held*, also, that the following plea, viz., the defendants say there is no body corporate and politic known and designated by the name and style of The President and Trustees of the town of *Connersville*, was bad.—*The Pres. and Trust. of the Town of Connersville v. Wadleigh*.....297
47. In this suit a declaration similar to that in *Peters et al. v. Land, 5 Blackf.*, 12, was held to be valid.—*The State v. Eitzroth et al.*.....338
48. A plea in bar, in such case, that there is no such judgment on the justice's docket as that described in the declaration, is good.....*Ibid.*
49. A plea which professes to answer the whole declaration, and only answers a part, is bad.—*Hickley v. Grosjean et ux*351
50. The party committing the first fault in pleading is not entitled to a repleader, though the verdict against him be on an immaterial issue.—*Andre v. Johnson*.....375
51. If the declaration on a bond with a condition do not set out the condition and assign breaches, and the defendant plead *non est factum* or fraud, the condition and breaches may, before trial, be suggested on the record.—*Seeright v. Fletcher*..380
52. In case of such suggestion, the defendant can not plead to the breaches, but he may introduce evidence, on the trial, to controvert them..*Ibid.*
53. The statement of demand in a suit by an administrator, in a justice's Court, was substantially as follows: The defendant on, &c., had "swapped" a certain bay horse to A, the intestate, and delivered the horse to him; the defendant afterwards took the horse into his possession without the plaintiff's consent, and converted him to his own use, &c.; to the plaintiff's damage, &c. *Held*, that this was a sufficient statement in trover. *Held*, also, that it was too late, after a plea to the merits, to object to the statement of demand.—*Davis v. Davis*.....394

54. If the defendant demur, and plead to the statement of demand, the plea overrules the demurrer.....*Ibid.*
55. If a rejoinder be double, the plaintiff may demur to it for duplicity; but if he surrejoins, he must answer both parts of the rejoinder.—*Neff et al. v. Powell et al.*.....420
56. The declaration in debt on a recognizance of special bail need not aver that a *capias ad satisfaciendum* had issued against the principal, and been returned *non est inventus*. But such writ and return, if denied by plea, must be proved.—*Holton v. Smith*424
57. The declaration in debt on a bond stated that the condition, after reciting that the defendant had been licensed to retail spirituous liquors, &c., was that, should the defendant not permit any gambling, rioting, or disorderly conduct in his house, but conform to the laws of the State restraining gambling, rioting, and disorderly conduct in his house, and should he not suffer any unlawful assemblies, or sell or retail any spirituous liquors on the Sabbath day, except to travelers, then the bond to be void. Breaches assigned, 1, That the defendant did permit disorderly conduct in his house, in this, viz., that on, &c., he permitted A, B, and C, to conduct themselves in a disorderly manner in his house, by then and there fighting and quarreling together, &c. 2, That the defendant suffered unlawful assemblies in and about his house, during the continuance of his license, &c. 3, That the defendant, during the continuance of his license as aforesaid, sold and retailed spirituous liquors on the Sabbath to divers persons who were not travelers, viz., one pint of whisky to A, one pint of brandy to B, and one pint of whisky to C, &c. 4, That the defendant permitted gambling, rioting, and disorderly conduct in his house, during the time for which he was licensed as aforesaid, and did not conform to the laws restraining gambling and disorderly conduct about taverns and public houses, &c. *Held*, that the bond was valid. *Held*, also, that though the bond was described in the declaration as payable to B., treasurer of H. county, and appeared on *oyer* to be payable to B., treasurer of H. county,

- or his successors in office, the variance was immaterial. *Held*, also, on general demurrer, that the first breach was good, and the second and fourth bad. *Held*, also, that the third breach was bad, on special demurrer, for duplicity.—*Boles v. McCarty*427
58. The declaration in a suit on a bond for the prison limits, described the judgment under which the imprisonment took place as of a certain date and amount, and averred that the judgment was erroneously recited in the condition of the bond as of a different date and amount (setting them out). *Held*, that the declaration was bad on general demurrer. *Held*, also, that such mistake in the recital in the condition of the bond might be corrected by a Court of chancery. *Held*, also, that the declaration in a suit on the bond might describe the condition without noticing the mistake in the recital, and the defendant would be estopped from showing the judgment to be different from that recited.—*Bowen et al. v. Gresham*...452
59. A plea, if ambiguous, must be taken most strongly against the pleader.—*Burrows et al. v. Yount*...458
60. A plea of *nil debet* to an action of debt on a bond is bad on general demurrer.—*Noel et al. v. The State*.
523

PRACTICE.

- See CHANCERY, 6. CONSTABLE, 2. COURT. DELIVERY BOND, 2. INDICTMENT, 10. INQUIRY, WRIT OF. PLEADING, 17. PROMISSORY NOTES, 32. REPLEVIN, 5. WITNESS, 5.
1. The Circuit Court refused to permit the defendant to withdraw one of his pleas after some of the jurors were sworn, the withdrawing of which would have deprived the plaintiff of the right to open and close the cause to the jury. The Court said that, admitting they had a supervisory power over the discretion of the Court below in such case—a point not decided—they saw no reason for supposing that the discretion, in this case, had been improperly exercised.—*Sanders v. Johnson*.....50
2. In a suit for an account, where there are issues of law and fact, a final judgment for the plaintiff for the amount of his claim, without a jury

- of inquiry and without evidence is erroneous.—*Stewart et al. v. Contrall*..74
3. The issue on the plea of *nil tiel record* must be tried by the Court, and not by a jury.—*White v. Elkin*..123
4. Debt on a promissory note. Pleas, 1, *Nil debet*. 2, Payment and set-off. Two replications to the second plea. Demurrers to the replications. Demurrers overruled, and final judgment for the plaintiffs. *Held*, that the judgment—the general issue remaining undisposed of—was erroneous.—*Cook et al. v. Brown et al.*.....220
5. In an action against *A, B, and C* on a joint promissory note, a suggestion on the record that it was made known to the Court that *A* was not found, is sufficient to authorize the plaintiff to proceed against *B* and *C*, they having appeared to the action and pleaded.—*Lowe et al. v. Blair et al.*.....282
- 6 The issue on the plea of *nil tiel record* should be tried by the Court, and not by a jury.—*Merkle v. Bolles et al.*.....288
7. If in assumpsit on a promissory note, and for goods sold and delivered, the general issue and a plea in confession and avoidance be filed, the plaintiff can not have a verdict without proving, to the satisfaction of the jury, the matter alleged in the declaration.—*The Pres. and Trust. of the Town of Connersville v. Wadleigh*.....297
8. After a final decree had been rendered in a cause, the Court ordered (the defendant threatening to appeal, &c.) that the transcript be withheld from the defendant till he should make certain payments, &c. *Held*, that this order was erroneous. *Martin v. Martin*.....321
9. *Held*, that it is error in the Circuit Court to reinstate an action which had been dismissed at a previous term—no cause being shown for reinstating it.—*West v. Noakes*.....335
10. If no objection be made to an instruction to the jury when it is given, it can not be objected to on error.—*Comparet v. Hedges*.....416
11. An appeal bond taken in the case of an appeal to the Circuit Court from a justice's judgment, and not objected to in the Circuit Court, can not be objected to in the Supreme Court.—*Ezra v. Manlove*.....454

12. No objection to such bond can authorize the dismissal of the action by the Circuit Court.....*Ibid.*
13. To authorize the plaintiff in a suit on contract against two, to proceed to judgment against one alone, it must appear that the other was not found.—*Depew v. Wheelan et al.*..485
14. If to a plea of former recovery, the plaintiff reply that the causes of action are not the same, the issue is for a jury.—*James v. The Lawrenceburgh Ins. Company*.....525
15. If a defendant appear and plead to an action, and afterwards withdraw his plea and appearance, the case stands as if there had been no appearance and plea.—*Lodge et al. v. The State Bank*.....557

PRINCIPAL AND AGENT.

An agent for attending to and managing a grocery and provision store, &c., is not, in consequence of such agency, authorized to draw or indorse notes in the name of his principal.—*Smith et al. v. Gibson*.....369

PRISON LIMITS.

That part of the prison limits in *Jefferson* county which adjoins the *Ohio* river, extends no further than to low water mark.—*Cowden et al. v. Kerr et al.*.....280

PRIVILEGE.

1. If a party to a cause be arrested on process in a civil suit, in coming to, attending upon, or returning from Court, he may be discharged by *habeas corpus*, or on motion in the Court from which the process issued.—*Crocker v. Duncan*.....278
2. If a suitor be arrested in two cases, in one of which he is privileged from arrest, and in the other not, a motion to discharge him entirely from custody should be overruled. *Ibid.*
3. A *capias ad respondendum* requiring bail was served, and bail taken, on the 2d of *August*, 1841, the day of the general election. *Held*, that the defendant ought to be discharged from the custody of his bail, and the bail from his recognizance; but that there was no ground for quashing the writ.—*Dumont v. Wright*.....540

PROBATE COURT.

See CHANCERY, 1. JURISDICTION, 5, 6, 11, 12.

PROMISSORY NOTES.

See BOND, 2, 3, 4. EXECUTION, 2, 3.
SEALED NOTE, 1.

1. The assignee of a promissory note negotiable and payable at a branch of the State Bank, may, by virtue of the statute, join the maker and indorsers of the note in one suit; but he can not so join the maker and part of the indorsers, unless those not joined are dead.—*Dillon et al. v. The State Bank*5
2. Although the declaration in such case show that the maker and part only of the indorsers are sued, it should not, on that account, be demurred to, but the non-joinders should be pleaded in abatement, unless the declaration show that the party omitted is alive*Ibid.*
3. Debt by the assignee of the payee against the maker of a promissory note negotiable and payable at a branch of the State Bank. The note was assigned before it became due. Pleas—1, That the note was executed without consideration; 2, That the payee obtained the note of the defendant by fraud; 3, That the consideration of the note had failed. Held, on general demurrer, that the pleas were insufficient.—*Glover et al. v. Jennings*10
4. Debt by an assignee against the maker of a promissory note negotiable and payable at a bank in *Cincinnati*. The note was indorsed before it became due; and a statute of *Ohio*, similar to the law-merchant, governed the case. Plea, that when the note was executed, the defendant was not indebted to the payee; that it was given as an accommodation note, to be discounted at bank; that if the note should be discounted, and the money paid to the payee or the defendant, it was to remain in force, otherwise to be void; that the note was not discounted; and that the indorsement was made with notice to the plaintiff of the above-named facts, and without consideration. Held, that the plea was good.—*Munson v. Cheesborough et al*17
5. If the payee and owner of a promissory note, negotiable and payable at a chartered bank within the State, indorse it to a third person, and be afterwards sued by the latter on the indorsement, he may defeat the suit by showing that the indorsement was made without consideration; and a plea to that effect, stating, also, that the note was not designed to be negotiated in bank, &c., is not objectionable for duplicity.—*Niles v. Porter*44
6. But if the indorsement of such note (the indorser not being the owner) be made for the maker's accommodation, and the indorser be sued by a *bona fide* holder for value, who received the note before it was due, the want of consideration for the indorsement is no defense to the suit, though the plaintiff knew, when he received the note, for what purpose the indorsement was made; and the circumstance that the note was not put in circulation, &c., makes no difference.....*Ibid.*
7. In a suit by an assignee against the maker of a promissory note not governed by the law-merchant, the defendant may prove, under the general issue, a breach of warranty as to the quality of goods sold to him by the payee, for the price of which the note was given, in order to lessen the amount to be recovered.—*Compart et al. v. Johnson et al.*59
8. A promissory note was filed in debt as the cause of action, and the general issue pleaded without oath. Held, that the execution of the note was admitted.—*Parry et al. v. Henderson*72
9. Debt on a promissory note in the usual form, by an assignee, against the maker. Plea in bar of the action, that the note was given in consideration of two accepted bills of exchange, one of which was not due when the suit was brought; that, when the note was given, the payee agreed in writing with the defendant not to demand payment of it until the bills were paid, &c.; that the bills had not been paid, &c., and the consideration of the note had therefore failed. Held, that the plea did not show a failure of consideration; it not appearing but that the defendant still held the bills, &c., and that the one not due would be paid at maturity. Held, also, that the note and the written agreement described in the plea formed one contract, according to which the time for demanding payment of the note had not arrived when the suit was commenced; and that the plea, therefore, amounted to the general issue.—*Thomas v. Page et al.*78

10. Credits entered on a note upon which suit is brought are proper matters for the consideration of the jury in estimating the amount due.—*Henderson v. Reeves*.....101
11. An assignee of a promissory note obtained judgment in time against the maker, and, after a delay of more than six months, took out a *fiery facias* on the judgment. The execution was returned *nulla bona*. *Held*, that the delay in issuing the execution, unexplained by the assignee, discharged the assignor from his liability on the assignment.—*Bishop et al. v. Yeazle*.....127
12. In a suit on a promissory note against several defendants, the plaintiff need only prove its execution by those who plead the general issue under oath; its execution by the others is admitted.—*Taylor et al. v. Gay*.....150
13. Such note is established by the plaintiff's producing it, or accounting for its absence, and by his proving the defendant's signature by a subscribing witness, if there be one; and if not, by proving the defendant's handwriting; an actual delivery of the note need not be proved. *Ibid.*
14. Although a promissory note be obtained from the maker by fraud, &c., yet if he induce an innocent person to take an assignment of it without disclosing the objection, he will be liable to the assignee on the note, notwithstanding the fraud, &c.—*Sloan v. The Richmond T. and M. Company*.....175
15. To a suit on a promissory note, brought by the assignee of the payee against the maker, the defendant pleaded that the note was assigned for collection only, the proceeds to be credited on certain notes given by the assignor. *Held*, that the plea was insufficient.—*Butler v. Sturges*.....186
16. Debt by A, indorsee of B, against C, as surviving partner of the firm of C and D, on a promissory note executed in the name of the firm, and payable to the indorser. The note was executed and made payable in the State of *New York*, where it was negotiable by the law-merchant, and was indorsed before it was due. Pleas—1, The general issue; 2, That before the indorsement and before the note was due, C and D executed other promissory notes to the payee, which the latter accepted in full satisfaction and payment of the note sued on. *Held*, on general demurrer to the second plea, that, by the law-merchant, which governed the case, that plea, assuming it to be valid in other respects, was insufficient for not alleging that, before the indorsement, the plaintiff had notice of the payment. *Held*, also, that, under the first plea, proof of the death of D was not necessary to sustain the suit.—*Bradley v. Ward et al.*.....190
17. Two persons made a bet of goods of the value of \$100, on the result of a Presidential election, and each executed his promissory note to a merchant for that sum; the payee, with notice of the facts, agreeing to furnish the goods to the winner. The loser was to pay his note, and the winner's was to be void. After the election, a suit on the note given by the loser was brought by an assignee. *Held* that though the goods had been delivered to the winner by the payee of the note, the suit could not be sustained, the consideration of the note being illegal.—*Duncan v. Cox*.....270
18. In a suit on a promissory note by the payee against the maker, the defendant has no right, under the general issue, to give in evidence a writing on the back of the note, purporting to be an assignment of the note by the plaintiff, without proof of the execution of such writing.—*Martin v. Crosby*.....296
19. A promissory note payable at the branch at *LaFayette*, of the State Bank, was indorsed to the State Bank. The indorser, when the note and indorsement were executed, resided in said town, but was absent in another State when the note fell due. *Held*, that notice of the dishonour of the note, put into the post-office at *LaFayette*, by a notary, and directed to the indorser in that town, was insufficient.—*Curtis v. The State Bank*.....312
20. If, when such note falls due, the parties reside in the same town, and there be no penny-post there, notice of the dishonour of the note should be personally given to the indorser, or left at his dwelling-house or place of business.....*Ibid.*
21. If the indorser in such case be true

- porarily absent, the notice should be sent to the house in which he last lived or did business.....*Ibid.*
22. An allegation in the declaration in a suit against such indorser that due notice had been given to him of the dishonour of the note, is not satisfied by proof of matters of excuse for not giving such notice.....*Ibid.*
23. The payee of a lost promissory note, not having indorsed it, may maintain an action at law on it against the maker.—*Depew v. Wheelan et al.*.....485
24. In a suit under the statute of 1839, against A, the maker, and B, the indorser, of a promissory note payable at bank on a certain day, a count, to be valid, must show a good cause of action against each of the defendants.—*Goodlet v. Britton*...500
25. A count in such suit, as respects the indorser, should aver a demand at the bank on the maker, when the note fell due, and notice of his default to the indorser.....*Ibid.*
26. A suit under said statute must be brought against all the makers and indorsers living; and the plaintiff must recover, if at all, against all the defendants served with process, unless where there is a plea by one or more of them showing a personal discharge.....*Ibid.*
27. The second indorser of an accommodation note is not liable for contribution to the first indorser, who has paid the note.—*Wilson v. Stanton*.....507
28. The legal effect of a blank indorsement of a promissory note, transferred in a regular course of business, can not be controlled by parol evidence that the indorsement was without recourse.—*Wilson v. Black*.....509
29. In assumpsit by the assignee against the assignor of a promissory note, a special plea denying the assignment is bad on special demurrer, as amounting to the general issue.*Ibid.*
30. Assumpsit by the assignee against the assignor of a promissory note, assigned after it became due. *Held*, that a delay of seven days after the assignment, in commencing suit against the maker, was not of itself sufficient evidence of the want of due diligence.—*Kelsey v. Ross et al.*.....536
31. In debt by an assignee against the maker of a promissory note, the gen-

eral issue, sworn to in general terms, does not require the plaintiff to prove the execution of the assignment.—*Vestal v. The State et al.*.....555

32. In a suit against several persons as makers, and others as indorsers, of a promissory note, negotiable and payable at a bank within the State, a judgment by default can not be rendered against some of the defendants only, unless there be a return of "not found" as to the others.—*Lodge et al. v. The State Bank*.....557
33. If in a suit against the makers and indorsers of a promissory note, under the statute of 1839, the defendants appear and plead to the action, the plaintiff must recover, if at all, against all the defendants.....*Ibid.*

PURCHASER.

See VENDOR AND PURCHASER.

R

RECOGNIZANCE.

See BASTARDY, 8.

1. The condition of a recognizance that a person shall appear at the then next term of the Circuit Court, and from day to day, &c., is a condition for his appearance on the first day of the term, and on every other day thereof, unless sooner discharged.—*Wilson v. The State*...212
2. If the defendant, in *scire facias* on a recognizance, wish to deny the forfeiture of the recognizance, he must plead *nul tiel record*.....*Ibid.*
3. If a *scire facias*, on a recognizance entered into by two persons jointly, issue against one of them only, the omission of the other can only be taken advantage of by a plea in abatement; and the plea in such case must show that the party not sued is living.....*Ibid.*
4. A circuit judge may take a recognizance at his chambers, during the term of a Circuit Court, conditioned for the appearance, at a subsequent day of that term, of a party accused of a crime.—*Crandall et al. v. The State*.....284
5. A recognizance taken by a justice of the peace for the appearance before him, at a subsequent day, of a party accused of a crime, is not void for not showing that it was attested by the justice.—*Ross v. The State*.....315

6. Although a recognizance in such case be substantially defective, a *scire facias* suggesting the defect may, by statute, be issued upon it; and the omission of such suggestion (the recognizance being copied into the *scire facias*) can only be taken advantage of, if at all, by special demurrer *Ibid.*
7. A recognizance in such case, purporting to be signed and sealed by the recognizor, and to have been acknowledged before the justice, is a sufficient foundation for a *scire facias*; and if the recognizance was not entered into by the party sued on it, so as to be obligatory on him, the objection should be made by plea *Ibid.*
8. When such recognizance is in a sum beyond the justice's jurisdiction, and is forfeited, it should be certified to the Circuit Court; and a *scire facias* on it may, in such case, issue from that Court *Ibid.*

RECORD.

See SCIRE FACIAS, 7.

1. The transcript of a judgment of a justice of the peace of *B.* county, on which a *scire facias* to have execution is issued by a justice of the peace of *C.* county, is no part of the record of the suit by *scire facias*, unless made so by a bill of exceptions.—*Robinson v. Tousey*.....256
2. At the next term after judgment was arrested, a judgment was rendered against the plaintiff for costs. *Held*, that the latter judgment was no part of the record of the cause in which the arrest of judgment was entered.—*Powell et al. v. Kinney et al*359

RELEASE.

See REPLEVIN, 8.

REPLEVIN.

See JUSTICE OF THE PEACE, 16.

1. Debt on a replevin bond. Pleas, 1, *Non damnificatus*. 2, If the plaintiff was injured, it was by his own wrong. 3 and 4, The goods belonged to the principal obligor. 5, The principal obligor was ready and willing to prosecute his writ of replevin with effect, but the Court, at the instance of the plaintiff, dismissed the cause for want of jurisdiction, on the ground of defects

- apparent on the face of the affidavit and the writ; that no damages were recovered in the action of replevin, nor was a return of the property awarded. 6, The bond was executed without consideration. 7, The consideration of the bond was illegal. 8, No record of the replevin suit. 9, The same with the 5th. *Held*, that these pleas, except the 8th, were insufficient.—*Sherry et al. v. Foresman et al.*.....56
2. If a judgment in the Circuit Court in a personal action be replevied, the bail is a joint debtor in the judgment with the principal.—*Carnahan v. Brown*.....93
 3. After the death of the principal in such case, and within a year after his death, a *fi. fa.* was issued on the judgment against the principal and bail, describing the latter as replevin bail. *Held*, that the execution was unobjectionable.....*Ibid.*
 4. The *fi. fa.* in such case, though nominally against the principal and bail, for the sake of conforming to the judgment, can be enforced only against the latter, on account of the death of the former.....*Ibid.*
 5. Replevin against two persons, who pleaded the general issue. One of them also justified as sheriff under an attachment against a stranger, to whom he alleged the goods belonged, and pleaded three other pleas of property in persons other than the plaintiff. Replications traversing the last three pleas, the first special plea not being noticed. Verdict that the right of property was in the plaintiff, and judgment in his favour. *Held*, that the judgment was erroneous because the jury had not found for the plaintiff on the general issue, and because the first special plea remained undisposed of.—*Richardson et al. v. Adkins*.....141
 6. If in an action of replevin, commenced before a justice of the peace, the affidavit filed be such as the statute on the subject requires, no other statement of the demand is necessary.—*Andre v. Johnson*....188
 7. Same point decided.—*Erwin v. Shaw*287
 8. An absolute release "of all demands whatever," executed by the plaintiff to the principal obligor of a replevin bond, on which the suit was brought, is a discharge of the bond.—*Thomas v. Wilson et al*203

9. In debt on such bond against the principal and surety, the latter let judgment go by default; the former pleaded an absolute release, and, on demurrer to his plea, obtained judgment. *Held*, that the plaintiff could not have damages assessed against the surety.....*Ibid*.
10. The defendant in an action of replevin, commenced before a justice of the peace, and taken by appeal to the Circuit Court, may, by statute, prove property in himself or a stranger, without pleading it.—*Lewis v. Masters*243
11. A plea in replevin, relying on the defendant's seizure of the goods as a constable, under an execution against a third person, should aver the property of the goods to be in such third person.—*Gentry v. Bargis et ux*.....261
12. A declaration in replevin by husband and wife should show specially the wife's interest in the goods.*Ibid*.
13. A plea in replevin of property in a stranger, or in the defendant, denies the plaintiff's property in the goods, and gives the plaintiff a right to begin.....*Ibid*.
14. A replevin bond executed in June, 1821, was taken and acknowledged before the clerk of a Circuit Court; the same clerk, since deceased, had issued executions on the bond; and his successor found the bond among the papers of the Court. *Held*, that these facts were sufficient to establish the approval and filing of the bond, under the act of 1821, by the clerk in office at the date of the bond.—*Doe d. Burge et al. v. Cunningham*430
15. It is no objection to such a bond that, in reciting the judgment on which it is predicated, it omits a credit entered on the judgment.*Ibid*.
16. In replevin in the *detinuit*, which is now the usual form, the declaration need not state the value of the goods.—*Britton v. Morss*.....469

REPLEVY.

- A judgment of a justice of the peace, rendered previously to the 1st of December, 1839, and which had been replevied, is not within the act of 1840, authorizing an additional replevy in certain cases.—*McIntosh v. Shotwell et al*.....281

RESCINDING OF CONTRACT.

See CONTRACT, RESCINDING OF.

RESTITUTION.

See VENDOR AND PURCHASER, 15.

RIGHT OF PROPERTY, TRIAL OF.

There may be a trial of the right of property on which an execution has been levied under the statute of 1838 regulating trials of the right of property, though the value of the goods exceed \$100.—*Hanna v. Steinberger et al*.....520

RIOT.

If three or more persons do an unlawful act of violence—as if they violently and unlawfully burst open the door of another person's dwelling house, &c., the offense is indictable under the statute.—*The State v. Seaggs et al*.....37

S

SCHOOL COMMISSIONER.

See INDICTMENT, 26, 27.

The condition of the bond of a school commissioner, that he will pay over to his successor, at the expiration of his term of service, all moneys which may then be in his hands, is broken if the commissioner die with school funds in his hands unaccounted for; and his successor in office may maintain an action on the bond against the sureties for such funds.—*Allen et al. v. The State*252

SCIRE FACIAS.

1. Appeal from the judgment of a justice of the peace on a *scire facias* against bail for the stay of execution. *Held*, 1, That as the justice's transcript stated that a plea had been filed without showing what it was, it must be presumed to have been the statutory plea allowed in actions before justices of the peace requiring proof of the demand. 2, That the transcript of the judgment appealed from and the *scire facias* were no evidence of the truth of the matters alleged in the latter. 3, That the constable's return to the execution against the original judgment-debtor could not be controverted in this suit.—*Burger et al. v. Becket*.....61
2. A *scire facias* against bail, which was issued by a justice of the peace

- in April, 1840, recited a judgment rendered by the justice against the original debtor in November, 1839, and alleged that the defendant, in November, 1840, entered himself as bail for the stay of execution on said judgment for 150 days, which period had long since elapsed, &c. *Held*, that the *sci. fa.* could not be objected to on general demurrer, on account of the repugnant allegation as to the time of the entry of bail. *Held*, also, that a transcript of an entry of bail of a different date from the objectionable time when the *sci. fa.* alleged the entry to have been made, could not be objected to as evidence on the ground of variance. — *Remington v. Henry*.....63
3. In a *scire facias* against bail for the stay of execution, he is not permitted to show that the officer's return to the execution against the principal debtor is false.....*Ibid.*
4. A *scire facias* to have execution against real estate on a judgment of a justice of the peace, must show that a transcript, not only of the judgment, but of the proceedings upon the judgment, had been filed in the Circuit Court — *Cudding v. Deal*.....80
5. It is no defense to a *scire facias* to have execution on a justice's transcript, that the defendant had and still has sufficient goods, &c. Nor is it any defense in such case, that the judgment is replevied, and that the surety had and still has sufficient goods, &c. — *White v. Elkin*.123
6. A *scire facias* on a recognizance of special bail indorsed, as the statute requires, on a *capias ad respondendum*, should aver, *inter alia*, that the principal had not rendered himself, in discharge of the judgment. — *Nichols v. Woodruff*.....180
7. In a suit by *scire facias* against replevin bail, the proceedings in the previous suit against the principal are no part of the record. — *Winn v. Burt*183
8. A *scire facias* against bail, issued by a justice of the peace in the name of *Swearengen and Co.*, as plaintiffs, was held to be bad. — *Tanner v. Swearengen and Co.*.....277
9. An order made at the term at which a recognizance conditioned for the party's appearance, &c., is forfeited, that a *scire facias* issue, commanding the recognizor then and there to appear, &c., does not vitiate a *scire facias*, reciting such order, founded on the recognizance, and returnable to the next term. — *Crandall et al. v. The State*.....284
10. A *scire facias* to have execution against real estate on a justice's transcript, which does not allege that the transcript had been entered on the docket of the Circuit Court, or that it had been filed in the clerk's office, can not be sustained. *Clifford et al. v. Wright*.....296
11. In a *scire facias* against A, B, and C, on a recognizance conditioned for A's appearance, &c., the plaintiff can not, on a suggestion that the writ had not been served on A, proceed to judgment against B and C alone. — *Burton et al. v. The State*. 3:39
12. A's name was omitted in the body of said recognizance, but it appeared that he had signed and sealed it with the others, and that it was taken and approved by a judge. *Held*, that, notwithstanding the omission, the recognizance was valid, under the statute, as to all the defendants. *Held*, also, that no suggestion of the omission was necessary in the *scire facias*, as it set out the part of the recognizance objected to *in hæc verba*.....*Ibid.*
13. If the plaintiff undertake, in such *scire facias*, to give the recognizance *in hæc verba*, he is bound to set out an exact copy.....*Ibid.*
14. A *scire facias* on a justice's transcript need not show the date of the execution which had issued on the justice's judgment, nor of its return of "no property found." — *Campbell et al. v. Baldwin*.....364
15. A husband is a proper party to a *scire facias* on a justice's transcript of a judgment rendered against his wife whilst sole.....*Ibid.*
16. *Scire facias* to have execution against real estate on a justice's transcript. *Held*, that the execution issued by the justice and its return if denied, must be proved by producing the original execution and return, or copies certified by the justice, or sworn copies. — *Henkle v. German*423
17. In *scire facias* on a justice's transcript to have execution against real estate, a plea that the defendant had not, at the time of filing the plea, nor at any time after the writ issued,

- any such estate, is bad on general demurrer.—*Roller v. Custer*.....433
18. A plea to such suit, that the justice's judgment had been materially altered after the *scire facias* issued, without showing what the alteration was, is insufficient.....*Ibid.*
19. To pleas in such suit denying the existence of the justice's judgment when the *scire facias* or the execution mentioned in it issued, the plaintiff replied that the justice had, by leave of the Court, amended his transcript after the same was filed, by inserting after the verdict a judgment, &c. Held, on general demurrer, that the replication was bad.
Ibid.
20. A judgment for the plaintiff in the *scire facias* is erroneous, if there be a plea unanswered denying the existence of the justice's judgment.
Ibid.
21. An allegation in the *scire facias* that the justice who certified the transcript was an acting justice of the peace, and that the transcript was filed in the W. Circuit Court, is sufficient to raise a presumption that he was a justice of W. county...*Ibid.*
22. A plea to a *scire facias* on a justice's transcript for execution against real estate, that it was not made known to the justice that the defendant had such estate, is bad on general demurrer.—*Mahan v. Power*415
23. The order book of the Circuit Court is evidence of the record of such transcript in that Court, but not of the execution and its return described in the *scire facias*.....*Ibid.*
24. A *scire facias* against A to have execution against real estate on a justice's transcript of a judgment against him and B, without alleging such previous proceedings as authorized the suit against A alone, is bad in substance. And an amendment of the *scire facias*, by alleging such previous proceedings, entitles the defendant to a continuance.—*Orput v. Hardy et al.*.....456
25. The said *scire facias* averred the judgment mentioned in the justice's transcript to be for \$69.15, with costs. The transcript offered in evidence was of a judgment for \$60.44, with the interest that had accrued and costs. Held, that there was no substantial variance, it appearing, on calculation, that the

amount due by the judgment mentioned in the transcript, was correctly stated in the *scire facias*..*Ibid.*

SEALED NOTE.

1. A plaintiff suing on a sealed or promissory note as indorsee, may, after a plea of non-assignment, or even at the trial, fill up a blank indorsement: indeed, it is immaterial whether the indorsement be filled up at all or not.—*Clark v. Walker*82
2. In a suit on the assignment of a sealed note for \$100, the declaration averred that the maker was insolvent. Plea, that the maker had real estate in the county worth \$200. Held, on general demurrer, that the plea was good.—*Foresman v. Marsh.* 285
3. In such suit, a judgment of a justice of the peace against the maker on the note, and an execution returned no goods or chattels, do not show sufficient diligence against the maker to charge the assignor....*Ibid.*
4. The plaintiff in such suit need not prove the signature of the maker, nor of a previous indorser.....*Ibid.*

SET-OFF.

See LIMITATIONS, STATUTE OF.

1. Assumpsit on a promissory note, and for goods sold and delivered. Plea, that as to \$166.14, part, &c., the defendant, before the commencement of the suit, &c., paid that sum to the plaintiff in manner following, viz., that the plaintiff was then and there, and still is indebted to the defendant in the said sum, for goods, &c.; before that time sold and delivered by the defendant to the plaintiff at his request, and for money paid, &c.; concluding with an offer to set off, &c. Held, that the plea was good.—*Woodruff v. Clark*.....337
2. The defendant in such suit can not plead as a set-off, nor give in evidence under the general issue, a decree in chancery in his favour against the plaintiff, though for a certain sum of money, if rendered in this State.....*Ibid.*
3. Assumpsit commenced before a justice of the peace by Rogers against White. Plea, payment and set-off. The matter of set-off was a joint and several promissory note for \$51.00 signed *Simmons* and Rogers, payable

to one *Richards*, and assigned by him to the defendant before the commencement of the suit. *Held*, that the set-off was admissible. *Held*, also, that the plaintiff's execution of the note could be denied only under oath.—*White v. Rogers*.

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SHERIFF.

1. A sheriff who seizes property by virtue of a *fiery facias*, and does not sell the same within a reasonable time, is liable for his non-feasance to the party injured, unless he have a legal excuse.—*The State v. Herod*.
444
2. In debt on a sheriff's bond, the breach assigned was the sheriff's failure to return a certain *fiery facias*. Plea, that on the return day of the execution, and for six days before, the sheriff was sick, and thereby rendered incapable of returning the writ, or of attending to the duties of his office, and so continued until his death. *Held*, that the plea was good.—*The State v. Guard et al*...519

SHERIFF'S RETURN.

See EVIDENCE, 31.

In *assumpsit* against *A, B, C*, and *D*, the sheriff returned the writ served as to *A* and *B*, and "not found" as to *C* and *D*, but stated in his return that he did not go to the house of *D*, by order of the plaintiff's attorney. *Held*, that there was no legal return of "not found" as to *D*.—*Lodge et al. v. The State Bank*...557

SLANDER.

1. Slander for charging the plaintiff with perjury. Pleas, the statute of limitations and a justification that the words were true. *Semble*, that the general bad character of the plaintiff in such case may, even under a justification, be proved with a view to lessen the damages.—*Sanders v. Johnson*...50
2. *Held*, that, in such case, the existence of prior reports charging the plaintiff with the crime imputed to him by the defendant, without any offer to explain their extent or effect upon the character of the plaintiff, is not, under a plea of justification, legal evidence in mitigation of damages.....*Ibid*.
3. *Held*, also, that there may, perhaps,

be cases in which the evidence—showing not the truth of the justification pleaded, but that the defendant had reason, from the glaring misconduct of the plaintiff, to believe the charge and plea justifying it to be true—may be considered by the jury in mitigation of damages; but that the record before the Court did not show such a case.....*Ibid*.

4. *Held*, also, that this being a very aggravated case, the refusal to grant the defendant a new trial because the damages (\$2,736) found by the jury were excessive, was not error...*Ibid*.
5. If the words in slander are laid as having been spoken to the plaintiff, it is a variance if they were spoken concerning him to a third person.—*Culbertson v. Stanley*.....67
6. Action of slander for words charging the plaintiff with stealing the defendant's chairs, &c. Plea, the statute of limitations. The plaintiff proved the speaking of the words within the prescribed time; but, according to one of his witnesses, the words laid in the declaration were accompanied by explanations which showed the charge made to amount only to a breach of trust. *Held*, that evidence by the defendant that the plaintiff had committed such breach of trust was inadmissible on the ground of irrelevancy.—*Burke v. Miller*.....155
7. If the plaintiff in slander prove the speaking of words not laid in the declaration, tending to show malice, the defendant may, under the general issue, prove those words to be true.....*Ibid*.
8. The defendant in such action may, under the general issue, prove the plaintiff's general character to be bad, in mitigation of damages; but he can not, either for that purpose or to defeat the suit, prove, under such plea, the existence of particular facts tending to show the truth of the words laid in the declaration.
Ibid.
9. Action of slander brought by *A* and *Mary A*, his wife, for the following words charged to have been spoken of the wife, and of and concerning her character for chastity: "Have you heard that *B* was hunting up a story in circulation about *C* and *Mary A* (meaning, &c.) being seen in the woods together? I saw them in the woods together myself,

- &c. If you had seen what I have, you would feel satisfied in your mind. God knows, and I know, that they are intimate." Thereby meaning that said *Mary* had been guilty of adultery with *C. Held*, that the words were not actionable, unless they were spoken in a conversation about the wife's character for chastity. *Held*, also, that as the general issue in said case was pleaded, as well as pleas admitting the speaking of the words, the plaintiff was bound to prove the cause of action in the same manner as if the special pleas had not been filed.—*Rickett et ux. v. Stanley*169
10. The special pleas in said suit were:
1, That the words were true, without averring them to be true in the sense ascribed to them in the declaration;
2, That before the speaking, &c., said *Mary* had been delivered of a bastard child;
3, That before, &c., she had been guilty of adultery with *C*;
4, That before, &c., she had been guilty of adultery with *D. Held*, that these pleas, except the third, were insufficient.....*Ibid.*
11. In slander, for charging the plaintiff, in the presence of "sundry persons," with larceny, the defendant pleaded that he spoke the words in giving testimony as a witness in a certain cause. *Held*, that the defendant might, on the trial, prove what the testimony which he gave was. *Held*, also, that the plaintiff, if he meant to proceed for speaking the words on some other occasion than that named in the plea, should have new assigned.—*Nelson v. Robe*.
204
12. A declaration in slander charged the defendant with speaking of the plaintiff certain actionable words in the *French* language, and gave a translation of the words into *English*. *Held*, that, by a demurrer to the declaration, the correctness of the translation was admitted.—*Hickley v. Grosjean et ux.*.....351
13. In determining, on such demurrer, whether the words laid are actionable, the Court can only be expected to examine the *English* words...*Ibid.*
14. The plaintiff in such case must aver in the declaration what he understands to be the meaning in *English* of the *French* words charged; and he must prove on the trial, under the general issue, not only the speaking of some of the *French* words laid which are actionable, but he must also prove that the translation of those words is correct...*Ibid.*
15. A *feme sole* brought an action of slander for words charging her with fornication and adultery. Pleas, not guilty, and that the words were true. *Held*, that the defendant might prove, in mitigation of damages, the plaintiff's general character as to chastity to be bad. *Held*, also, that evidence in support of the plaintiff's character was inadmissible, until there had been an attempt, by evidence, to impeach it.—*McCabe et ux. v. Platter*.
405
16. Actionable words not laid in a declaration in slander, having reference to the slander complained of, may, though spoken after the commencement of the suit, be proved to show malice in the defendant.—*McIntire et ux. v. Young*.....496
17. *Quære*, whether if the malicious intention be not equivocal, such evidence is admissible.....*Ibid.*
18. The admission of such evidence, offered by the plaintiff after the defendant had closed his testimony, will not be adjudged erroneous merely on account of the time when it was introduced.....*Ibid.*

SMALL BILLS.

- A penalty is inflicted, by an act of 1840, for issuing any small bill for the purpose of passing the same as a circulating medium, &c.—*Lister v. Boker*.....439

STATE BANK OF INDIANA.

1. The taxable stock in the branch at *Indianapolis* of the State Bank of *Indiana*, owned and paid in by individuals, is liable for the tax contemplated by the act to provide for the further construction of the *Madison* and *Indianapolis* railroad, approved *February* the 15th, 1841.—*The State v. The State Bank*.....349
2. In addition to the twelve and a half cents on each share of individual stock in said bank, to be deducted from the dividends for the purposes of education, the stock liable to the *ad valorem* tax is subject to the same ratio of taxation to which other capital is subject; provided the sum deducted from the dividends for education, and the *ad valorem* tax,

do not together exceed one per cent-
um.....*Ibid.*

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

SUNDAY.

A debtor legally arrested on *Sunday*, by virtue of an execution procured on that day, may obtain his discharge on the same day, under the execution-law.—*King v. Strain*.....447

SURETY.

1. In a suit by notice and motion, under the statute, by a surety against his co-surety, for contribution, the notice may be served by the plaintiff on the defendant in any county in the State.—*Cating v. Stewart*...372
2. Such suit may be brought in a justice's Court, if the demand do not exceed \$100*Ibid.*

T

TAXES.

See STATE BANK OF INDIANA.

1. A judgment vesting in the State a title to land for the non-payment of taxes, rendered since the act of 1835, on the subject, was repealed by that of 1839, is a nullity.—*Mount v. The State*.....25
2. To authorize a judgment vesting the title to land in the State, under the act of 1835, for the non-payment of taxes, there must be proof that all the requisites of the law have been complied with; and the evidence on the subject must appear in the record.—*Williams v. The State*.....36
3. The statute of 1836 does not require a person to give to the assessor of taxes a list of his personal property subject to taxation, but only the aggregate value of the same.—*The State v. Emshwiller*.....76

TERM OF YEARS.

See JUSTICE OF THE PEACE, 13.

TRANSCRIPT.

See AMENDMENT, 1. RECORD, 1.

1. In an appeal from the judgment of a justice of the peace to the Circuit Court, the cause of action filed with

the justice need not be copied or referred to in the justice's transcript.
White v. Fortune.....116

2. The certificate to a justice's transcript was as follows: "I, *Samuel Dale*, a justice of the peace in and for *Noble township*, county and State aforesaid, hereby certify the above to be a true transcript from my docket. *June 1, 1841.—Samuel Dale, J. P., (seal.)*" Held, that the certificate was sufficient.—*Wiley v. Forsee*.
246
3. The transcript of a justice's judgment and proceedings can be certified, for the purpose of procuring execution against the real estate of the judgment-debtor, only to the Circuit Court of the county in which the judgment was rendered.—*Stroud v. Davis*.....539
4. On appeal to the Circuit Court from the judgment of a justice of the peace, the certificate of the justice annexed to his transcript was as follows: "I hereby certify, that the foregoing is a true transcript of the proceedings had before me in the above cause, as appears from my docket. Given under my hand and seal," &c. Held, that the certificate was sufficient.—*Whitney v. Mills*.545

TREASURY NOTES.

See PAYMENT.

TRESPASS.

1. To maintain trespass *de bonis asportatis*, the plaintiff must have had, at the time of the trespass, the actual or constructive possession of the goods, or, at least, a general or special property in them, and a right to the immediate possession.—*Hume v. Tufts*.....136
2. An action of trespass does not lie against *A* for procuring a justice's warrant to search the premises and arrest the person of *B*, on suspicion of felony, and thereby causing the search and arrest to be made, although *A* acted maliciously and without probable cause; *B*'s only remedy for the injury being an action on the case.—*Tuell v. Wrink et al.*.....249
3. The warrant of a justice of the peace commanding a constable to search the premises, &c., of *B. P. Tuell*, does not command or authorize the constable to search the premises, &c., of *Benjamin P. Tuell**Ibid.*

4. If, in trespass against *A*, *B*, and *C*, there be a verdict for the defendants, which is right as to *C*, but which, as to the others, is unsupported by the evidence, a new trial should be granted to the plaintiff, on condition that he enter a *nolle prosequi* as to *C*.....*Ibid*
5. If a person unlawfully injure another's property, he is liable for the damage, without regard to the intention with which the act was done.—*Amick v. O'Hara*.....258
6. A person who chases a horse out of his field with a large, fierce dog, commits an unlawful act, and is liable for any injury to the horse which that act occasions.....*Ibid*.
7. The owner of personal property can not take it from the peaceable, though wrongful, possession of another by violence on his person.—*Andre v. Johnson*.....375
8. Trespass against *A* and *B*, for an assault and false imprisonment. *A* pleaded not guilty. He also pleaded as follows: That at the time of the trespass, &c., he was a justice of the peace; &c.; that a felony had been committed, &c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out); that, on, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that thereupon, afterwards, &c., the defendant being a justice of the peace as aforesaid, by reason of such felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty of such felony, and of such reasonable ground of suspicion and belief that the plaintiff was so guilty—commanded said *B* to arrest the plaintiff, and take him before some justice of the peace, &c.; that *B*, in pursuance of said command, gently laid his hands on the plaintiff, and took him before *C*, a justice of the peace, &c., to be dealt with, &c.; which is the same trespass, &c. *A* also pleaded a second special plea, which was similar to the first, except that it did not allege that he was a justice of the peace. *Held*, on general demurrer, that these special pleas of *A* were bad, for this reason, if no other, that they omit to set out the ground upon which the suspicion and belief of the plaintiff's guilt were founded.—*Wasson et al. v. Canfield*.....406
9. *B*, in said case, pleaded not guilty. He also pleaded as follows: That, at the time of the trespass, &c., he was a constable, &c.; that a felony had been committed, &c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out); that afterwards, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that one *A* and others charged the plaintiff with being guilty of said felony, and informed this defendant, he being a constable, &c., that the plaintiff was guilty; that afterwards, &c., this defendant, constable as aforesaid, by reason of said felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty thereof, and of reasonable ground for such suspicion and belief, and of said charge and information of *A* and others—for the purpose of carrying the plaintiff before some justice of the peace, to be dealt with, &c., gently laid his hands on the plaintiff, and took him before one *C*, a justice of the peace, &c., to be dealt with, &c.; which is the same trespass, &c. *B* also pleaded a second special plea which was similar to his first, except that it did not allege that he was a constable. *Held*, on general demurrer, that these special pleas of *B* were bad, for not showing that his informant stated the facts by which he knew or believed the plaintiff to be guilty, and for not setting out those facts.....*Ibid*.
10. *Held*, also, that a warrant illegal on its face, which had been issued by the defendant *A*, as justice of the peace, and under which the defendant *B* had made the arrest, &c., and which had been referred to by the plaintiff's witness, was admissible evidence for the defendants in mitigation of damages.....*Ibid*.
11. *Held*, also, that the defendant's might prove, in mitigation of damages, that at and shortly before the time of the arrest, &c., there was in the plaintiff's neighborhood an association of persons engaged in making and passing counterfeit money, &c.,

and that the plaintiff was generally reputed and believed there to have been one of that association; but that the facts that the plaintiff was one of that association, and had been engaged in passing counterfeit money knowingly, and with intent to defraud the public, should be specially pleaded.....*Ibid.*

12. The action of trespass *quare clausum fregit* is local, and can be brought only in the county in which the trespass was committed.—*Ham v. Rogers et al.*.....559
13. The circumstance that such trespass was committed in one county by persons resident in another, does not authorize the *capias ad respondendum*, issued in the former county, to be directed to the sheriff of the latter.....*Ibid.*

TROVER.

1. To sustain trover, the plaintiff must have had, at the time of the conversion, a general or special property in the goods; but it is not necessary that his interest in them should have continued until the commencement of the suit.—*Barton v. Dunning et al.*.....209
2. A constable levied an execution on a mare which was claimed by a third person; and on a trial of the right of property, the claimant succeeded. During the pendency of the trial, the constable delivered the mare to *A* and *B*, one of whom was the execution-plaintiff, they agreeing in writing to return the mare to the constable, or pay him \$35.50, should the claimant succeed. After the trial, *A* and *B* tendered to the constable \$35.50, which he refused, but they would not return the mare. *Held*, that the constable could not maintain trover against *A* and *B* for the mare.—*Grady et al. v. Newby.*442
3. Trover can not be sustained unless the plaintiff have a property in the goods, and a right to their possession.....*Ibid.*
4. To sustain trover, the plaintiff must show a right to the possession of the goods at the time of the conversion.—*Burton v. Tannehill*.....470

TRUST.

See VENDOR AND PURCHASER, 6.

U

USE AND OCCUPATION.

An action of assumpsit was commenced

on the 28th of *March*, 1842, against *W. J.*, for the use and occupation of land. Plea, that on the 1st of *March*, 1831, one *J. J.* entered into a written agreement with one *D.*, the attorney in fact of the plaintiff, by which *D.*, the attorney, leased the land described in the declaration to *J. J.*, for eleven years from that time; and that, in 1837, the defendant took a lease for the land from *J. J.*, and held it under him till the end of his term, and then quitted the possession. *Held*, on general demurrer, that the plea was bad.—*Frazee v. Jones*.....386

USURY.

1. A plea of usury, not specifying the particulars of the contract, &c., is bad on special demurrer.—*Livingston et al. v. The Ind. Ins. Company*, 133
2. Usury, as an indictable offense under the statute of 1838, consists in the taking or receiving unlawful interest, and not in merely contracting for such interest.....*Ibid.*
3. But still a party to such contract is not bound to testify as to its existence, if he declare on oath that his testimony will criminate himself; because the establishment of the contract, should he be afterwards indicted for receiving the usurious interest, might have a tendency to convict him.....*Ibid.*
4. A suit can not be sustained on a writing obligatory for the payment of money given upon a usurious contract, and governed by the statute of 1838; the illegal interest being included in the amount for which the obligation was executed.—*Fowler et al. v. Throckmorton*.....326
5. A contract made usurious by mistake, and not with a corrupt intention, is not within the statute against usury.—*Sutton et al. v. Fletcher*...362
6. A general plea of usury is bad on special demurrer.—*The Ind. Ins. Company v. Brown et al.*.....378
7. If a note given for a previously existing debt be void for usury, the original debt remains, and may be recovered.....*Ibid.*

V

VARIANCE.

See PLEADING, 29, 57. SCIRE FACIAS, 2, 25. SLANDER, 5.

1. If a bond sued on be described in

- the declaration as joint and several, and the bond produced on *oyer* be joint only, the variance is fatal.—*Sherry et al. v. Foresman et al.*.....56
2. If an instrument of writing be stated in pleading to have been made on such a day, without alleging when it was dated, an instrument dated on a different day from that stated may be given in evidence.—*Remington v. Henry*.....63
3. The declaration in a suit against *A* stated that the defendant, at the State of *Kentucky*, viz.: at the county, &c., made his promissory note, &c. The note offered in evidence was a joint and several note of the defendant and two other persons, and was silent as to the place of its execution. *Held*, that there was no material variance.—*Anderson v. Hamilton*.....94
4. The declaration in a suit on a delivery-bond stated the condition of the bond to be for the delivery of the goods on the *twentieth of June, 1840*, at the *farm of D. McKay*. The condition of the bond, as shown on *oyer*, was for the delivery of the goods on the *second of June, 1840*, at the *house of said McKay*. *Held*, on general demurrer to the declaration, that the variance was fatal.—*McKay et al. v. Craig*.....168
5. The declaration in assumpsit brought by *A* alleged that the defendant, by his note, acknowledged himself indebted to the plaintiff in the sum of, &c. *Held*, that a note by which the defendant acknowledged himself indebted to the estate of *C. D., deceased*, in the sum of, &c., was inadmissible on the ground of variance.—*McKinney v. Harter*.....320
6. In debt on a bond, the declaration alleged the condition to be for the payment of a certain sum of money on a certain day. The condition, as shown on *oyer*, was for the payment of the money out of the profits of certain real estate. *Held*, that the variance was fatal.—*Irish v. Irish*. 438
7. In support of an indictment for usury, charging the loan to have been for three months, evidence of a loan for three months and one month in addition thereto, if the borrower wished it, is inadmissible on the ground of variance.—*Merriman v. The State*.....449
8. Debt on a promissory note, payable eight months after date. The plaintiff offered in evidence the following note, made by the defendant: "Eight months after date, I promise to pay, &c., the sum of, &c., to be paid as soon as I get my returns from *New Orleans*, or the above date at farthest, for value received." *Held*, there was no variance.—*Hoo-ver v. Johnson*.....473
9. An indictment for usury stated that the agreement was to pay the usurious interest in advance, at the time the loan was made; but the evidence to support it was, that the agreement was to pay the usurious interest three months after the loan was made. *Held*, that there was a fatal variance.—*Groves v. The State*. 489

VENDOR AND PURCHASER.

See ASSUMPSIT, 2. PLEADING, 31.

1. If a person who has contracted with another to convey to him certain real estate die without having executed the conveyance, leaving several heirs, one of whom is a minor, the purchaser is not bound to accept a deed for the land from the adult heirs, and a bond of the guardian of the minor, with surety, conditioned for the minor's conveyance when he shall come of age.—*Barickman v. Kuykendall*.....21
2. If a person enter into a legal contract for the purchase of real estate, pay part of the purchase-money, and occupy the premises some time under the contract, he can not, on the vendor's breach of his agreement to convey, rescind the contract, and recover back the money paid in *indebitatus assumpsit*; his only remedy in such case being on the special contract.....*Ibid.*
3. A sale and conveyance of real estate in the adverse possession of a third person, made by commissioners under an order of Court in a suit for partition, are not a valid consideration for a note given for the purchase-money.—*Martin et al. v. Pace et al.*.....99
4. If a person out of possession convey land held adversely by a third person, the conveyance is void, on the ground of maintenance, and the title of the land remains in the grantor.....*Ibid.*
5. If a tract of land be sold with a representation that it contains a certain

- number of acres, and there be a deficiency in the quantity, the vendee is entitled to an abatement of the purchase-money for so much as the quantity falls short of the representation.—*Howk v. Pollard*.....108
6. If a father purchase real estate with his own money, in the names of his children, the purchase is an advancement to the children, and not a resulting trust for the father.—*Stanley v. Brannon et al.*.....193
7. Such a purchase is not within the statute against fraudulent conveyances; and, therefore, a subsequent purchaser, though *bona fide*, will not be relieved against it. But if such purchase were within the statute, still a subsequent purchaser, with notice, could not take advantage of it.....*Ibid.*
8. If a subsequent purchaser from the father, in such case, obtain a decree for the land against the father and the children, the decree saving to the children, who are infants, the right to show cause against it when they come of age, (and such purchaser afterwards sell the land to a third person), the circumstance that the latter's purchase was made whilst the decree was in force will not, even though his purchase was *bona fide*, prevent the children, when they come of age, from having the decree and his conveyance set aside....*Ibid.*
9. A executed a promissory note to B, in consideration that the latter would convey to him, by a deed with full covenants, a certain tract of land. By virtue of an execution on a judgment existing against B at the time of the contract, the land was subsequently sold by the sheriff to C; and after such sale, on execution, B and wife executed to C a deed with general warranty for the land. Afterwards, deeds for the land to A, by B and wife with full covenants, and by C and wife with covenants against C and those claiming under him, were tendered to A, and payment of the note demanded. *Held*, that A was not bound to accept the deeds and pay the note.—*Reynolds v. Smith et al.*.....200
10. The vendor of real estate, by taking the vendee's promissory note for the purchase-money, payable at a future time, with a third person as surety, waives his equitable lien on the land for such money, unless there be an express contract that the lien shall be retained.—*Boon et al. v. Murphy et al.*.....272
11. A note payable one day after date was given for the price of certain town lots, the title for which was to be made by the plaintiff to the defendant on payment of the purchase-money, and a demand of the deed *Held*, that it was no defense to a suit on the note that the deed had not been made or offered before the suit was commenced. *Held*, also, that it was no defense to such suit that, at the time of the sale, the plaintiff represented to the defendant that there was an alley on one side of the lots, and that the plaintiff had since conveyed to a third person the land adjoining the lots, and embracing the alley, if the plaintiff's plat of the lots, on which the alley was designated, was recorded before the execution of the conveyance. *Held*, also, that had such conveyance been material in the cause, the record of it would have been admissible evidence for the defendant, without accounting for the absence of the original.—*Daniels v. Stone*450
12. If a person sell real estate to be afterwards paid for, and contract to make a title to the purchaser on payment of all the purchase-money, it is not necessary to a recovery in a suit on a note, for part of the purchase-money (the residue having been paid), that a deed be executed or unconditionally tendered before the commencement of the suit.—*Burrows v. Yount*458
13. If a deed in such case be offered when the note falls due, or within a reasonable time afterwards, on payment of the note being made at the time of delivering the deed, the suit may be brought.....*Ibid.*
14. If a person, having obtained a decree in chancery for certain land, and been put into possession, sell the land to a *bona fide* purchaser for value, before a suit in error to reverse the decree is commenced, the title of such purchaser, or of those claiming under him, will not be affected by a subsequent reversal of the decree.—*McCormick et al. v. McClure et al.*.....466
15. And if, after such decree is reversed and the bill dismissed, a writ of restitution be opposed on the

- ground, supported by affidavit, that the facts are as above stated, the writ will be refused*Ibid.*
16. A mortgagee of land who purchases the equity of redemption at sheriff's sale, thereby extinguishes the mortgage-debt to the extent of the value of the mortgaged premises, after deducting the sum paid for the equity of redemption.—*Murphy v. Elliott*482
17. A vendor claiming a lien on land for a part of the purchase-money due, and purchasing the same land sold on execution subject to such lien, thereby extinguishes the debt so claimed as a lien, to the extent of the value of the land purchased, after deducting the sum paid on such sale.....*Ibid.*
18. Debt by the assignee of the payee of a promissory note against the maker. Plea, that the note was given in part consideration of a tract of land sold and conveyed by the payee to the defendant, of which the former falsely and fraudulently represented himself to be seised; that the payee, at the time of the sale, had no title to the land; and that the defendant had not taken possession, &c. *Held*, that the plea was good.—*James v. The Lawrenceburgh Ins. Company*.....525
19. A person in possession of real estate under a bond conditioned for a title on payment of the purchase-money, has not such an adverse possession as will invalidate a conveyance made by the owner, during such possession, to a third person.—*Allen v. Smith*.....527

VENUE.

See INDICTMENT, 19.

1. The record in this case showed that the defendant was indicted in the *Vigo* Circuit Court for the murder of *G. M.*; that he pleaded there not guilty; that he procured a change of venue for his trial on that indictment to the *Parke* Circuit Court; that the clerk of the former Court handed over the papers, and among them the indictment, (which was spread upon the record), to the clerk of the latter Court, in which they were filed; that the defendant was placed on his trial in the *Parke* Circuit Court for the murder of *G. M.*, on the plea of not guilty theretofore entered in that behalf; that he made

- no objection to the indictment on which he was tried; and that the indictment, which was recorded in the last-named Court, and on which the defendant was tried, was the one which was transferred among the papers in the cause. *Held*, that these facts showed that the indictment found against the defendant in the *Vigo* Circuit Court was the one on which he was tried.—*Beauchamp v. The State*.....299
2. When a change of venue is awarded in open Court, an entry on the record directing the change, and ordering the clerk to transmit the papers is a substantial compliance with the statute.—*Chapman v. Woods*.....504
3. If an indictment be found in the Circuit Court of one county, and be tried in the Circuit Court of another (the record not showing a change of venue, nor that any objection was made to the jurisdiction of the latter Court), a change of venue will be presumed.—*Doty v. The State*....529

VERDICT.

1. A verdict in a criminal case for the State, found by a jury consisting of eleven men, is erroneous.—*Jackson et al. v. The State*461
2. A verdict of guilty of petit larceny, disfranchising the defendant from holding any "office of trust," is valid, and authorizes a judgment disfranchising him from holding any "office of trust or profit."—*Doty v. The State*.....529

VOLUNTARY CONVEYANCE.

See CONVEYANCE, 4. VENDOR AND PURCHASER, 7.

W

WITNESS.

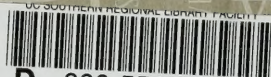
See BASTARDY, 3, 4. EVIDENCE, 34. GUARANTEE, 1. SLANDER, 11.

1. The statute authorizes the general moral character of a witness to be inquired into; but the inquiry should be, not what it was at any former period, but what it was at the time of the trial.—*Walker v. The State*.....1
2. The credit of a witness can not be impeached by proof of particular facts*Ibid.*
3. At the time of swearing his witnesses, and before they were exam-

- ined, the defendant moved the Court to remove such of the plaintiff's witnesses out of hearing as the latter held in reserve, which motion was overruled. *Held*, that the granting or refusing such motions is a matter of discretion, which did not appear to have been unsoundly exercised on this occasion.—*Sanders v. Johnson*.....50
4. In a suit against *A* and *B*, alleged to be partners of the firm of *B* and *Co.*, on a note executed in the name of the firm, *C* is a competent witness for the plaintiff to prove that *A* was a member of the firm, although a judgment have been previously obtained by the plaintiff against *C* on the same note.—*Henderson v. Reeves*.....101
5. An attorney brought suit on a note delivered to him for collection, and obtained judgment, which did not appear, by the record, to have been satisfied. The judgment-creditor sued the administrator of the attorney for the amount of the judgment, in an action for money had and received. *Held*, that the plaintiff could not introduce the judgment-debtor as a witness, to prove that the latter had paid to the attorney the money due by the judgment.—*Jenners v. Oldham*235
6. In an action on a promissory note brought by the assignee of the payee against the maker, the latter may call the payee as a witness to prove a plea of usury, or of payment to the witness before notice of the assignment, but not to prove a plea of payment to the plaintiff.—*Prather et al. v. Lentz*.....244
7. If a witness be competent to answer any questions in the cause, he ought not to be rejected generally.....*Ibid.*
8. The defendant, on a trial of an indictment for murder, examined a witness respecting his character, who referred in his testimony to rumors that had followed the defendant as to his character in a neighborhood where he had formerly lived. *Held*, that the counsel for the State might thereupon cross-examine the witness respecting the defendant's general character in his neighborhood as to his former conduct.—*Beauchamp v. The State*299
9. If a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be supported by proving other statements made by him in accordance with it.....*Ibid.*
10. On the trial of an indictment for murder, the defendant was permitted to prove by the son of the deceased, who had been sworn for the State, that he, the witness, and the widow of the deceased, who had also been examined for the State, had employed counsel to assist the prosecuting attorney in the cause, but was not permitted to prove that the fee to be given for such assistance was on condition of a conviction. *Held*, that there was no error in this part of the case.....*Ibid.*
11. A witness is not bound to answer any question if his answer will expose him to any criminal punishment or penal liability.—*Lister v. Boker*439
12. Before the credit of a witness can be impeached by showing that he had made a previous statement inconsistent with his testimony, he must be asked whether he had made such statement.—*McIntire et ux. v. Young*.....496
13. And if the statement be relevant to the issue, and the witness deny having made it, it may be proved. *Ibid.*
14. But if the statement be not relevant to the issue, the witness can not be questioned respecting it; nor can he be contradicted if he deny having made it.....*Ibid.*

WRIT.

Oyer of the writ (if in any case demandable) can not be craved after the day on which the cause is first set for trial.—*Layman v. Waynick* 189



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